United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1210

To be argued by
THOMAS E. ENGEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1210

UNITED STATES OF AMERICA,

Appellee,

—v.—

AL TAYLOR, WILLIAM TURNER, CHARLES RAMSEY, RUFUS WESLEY, AL GREEN, and HENRY SALLEY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
JOHN S. SIFFERT,
MARTIN B. MCNAMARA,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by Al Taylor, William Turner, a/k/a "Dog," Charles Ramsey, Rufus Wesley, a/k/a "Folks," Al Green and Henry Salley from judgments of conviction entered on May 7, May 12, May 21, May 27 and June 18, 1976 in the United States District Court for the Southern District of New York after a nine-week trial before the Honorable Kevin Thomas Duffy, United States District Judge, and a jury.

Indictment 75 Cr. 1112, filed November 18, 1975, charged the six appellants and eleven other defendants in fourteen counts with various violations of the federal

narcotics laws.* Count One charged the six appellants and Warren Robinson, a/k/a "Alan," Bryant Ferguson, James March, a/k/a "Bubbles," Dorethea Ann Ellis, a/k/a "Dorethea Ann Lane," Walter John Smith, a/k/a "Doc," a/k/a "Roger," Cecil Tate, a/k/a "Little Pete," Joseph LaSalata, a/k/a "Joe Sharp," Ernestine Barber, Basil Hansen, Arhelia Miller, a/k/a "Pinky," and Ronald Sweeney, a/k/a "Garbage Man," with a conspiracy to violate the federal narcotics laws from January 1, 1969 to December 6, 1973, the date of the filing of the indictment in *United States* v. *Carmine Tramunti, et al.*, 73 Cr. 1099, in violation of Title 21, United States Code, Sections 846, 812, 841(a)(1) and 841(b)(1)(A).** Count Two charged Warren Robinson with a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. Count Three charged Dorethea Ann Ellis with distribution of one-quarter of a kilogram of cocaine on or about June 13, 1971. Count Four charged Robinson and Wesley with distributing approximately one-half of a kilogram of heroin in August, 1971. Count Five charged Wesley with distributing approximately one-half of a kilogram of heroin on or about August 1, 1971.

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* Indictment 75 Cr. 1112 superseded Indictment 75 Cr. 788, filed August 5, 1975, adding the defendant Basil Hansen. Indictment 75 Cr. 788 in turn superseded Indictment 75 Cr. 747, filed July 28, 1975, correcting clerical errors. Indictment 75 Cr. 747 superseded 75 Cr. 455, filed May 5, 1975, adding eleven defendants. Indictment 75 Cr. 455 superseded *United States* v. *Carmine Tramunti et al.*, 73 Cr. 1099, filed December 6, 1973, as to appellants Salley and Green.

** The *Tramunti* indictment, 73 Cr. 1099, named Warren Robinson, Henry Salley, Al Green, and Basil Hansen. Robinson was convicted in the *Tramunti* case, as was Salley, but the latter's conviction was reversed based on ineffective assistance of counsel. *United States* v. *Tramunti*, 513 F.2d 1087, 1116-18 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). Al Green was severed in the middle of the trial after he suffered a fractured skull as a result of a fall down a flight of stairs. *Id.* 1094, n.10. Hansen was a fugitive at the time of the *Tramunti* trial. Id., n.8.

Count Six charged Ferguson, Robinson, and Miller, with distributing approximately one kilogram of heroin in September 1971. Count Seven charged LaSalata with distributing approximately one-half of a kilogram of heroin in November, 1971. Count Eight charged Green with distributing approximately one-quarter of a kilogram of heroin in or about January, 1972. Count Nine charged Robinson and Ferguson with distributing approximately one kilogram of heroin in January, 1972. Count Ten charged Robinson and Turner with distributing approximately one kilogram of heroin in March, 1972. Count Eleven charged Robinson and Salley with distributing approximately one-half of a kilogram of heroin in March, 1972. Count Twelve charged Ferguson with distributing approximately one-eighth of a kilogram of heroin in April, 1972. Count Thirteen charged Hansen with distributing approximately one-quarter of a kilogram of heroin in April, 1972. Count Fourteen charged Hansen with possessing with intent to distribute approximately 767 grams of heroin on or about October 4, 1973.*

Trial commenced with jury selection on January 29, 1976 as to thirteen defendants.** The defendant Robinson was severed at the conclusion of the jury selection upon renewed motion that his defense would be inconsistent with and, in some measure, antagonistic to his co-defendants to their irremediable prejudice.

On April 2, 1976, after five days of deliberations, the jury returned a verdict finding Taylor guilty on Count

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* Counts Three through Fourteen charged violations of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A), and, except for Count Fourteen which charged solely possession with intent to distribute, charged the defendant or defendants both with distribution and possession with intent to distribute.

** James March pleaded guilty to Count One and is scheduled for sentence on October 20, 1976. Dorethea Ann Ellis pleaded guilty to Count One, and on July 27, 1976 was placed on probation for a period of one year. Joseph LaSalata's case was severed on January 20, 1976 with the consent of the Government. Ronald Sweeney was a fugitive at the time of trial and remains at large.

One; Turner guilty on Count One and not guilty on County Ten; Ferguson not guilty on all counts in which he was named; Ramsey guilty on Count One; Wesley guilty on Counts One and Five, and not guilty on Count Four; Green guilty on Counts One and Eight; and Hansen guilty on Counts One, Thirteen, and Fourteen. The jury could not agree upon a verdict as to Smith, Tate, Barber and Miller; mistrials were declared as to them.

Judge Duffy imposed the following sentences:

Defendant	*Date of Sentence*	*Term of Imprisonment*
Al Taylor	May 14, 1976	8 years to be followed by a six-year term of special parole.*
William Turner	May 14, 1976	15 years to be followed by a six-year term of special parole, to run concurrently with a ten-year sentence imposed August 15, 1973 by the Honorable C. Stanley Blair, United States District Judge, District of Maryland, for income tax evasion.
Charles Ramsey	June 18, 1976	15 years imprisonment to be followed by a three-year term of special parole.**

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* Taylor was charged in an information with being a prior federal narcotics offender and admitted having been previously convicted. He was sentenced accordingly under the provisions regarding second offenders. 21 U.S.C. §§ 841(b)(1)(A), 851.

** Ramsey's sentence was delayed pending the outcome of *United States* v. *Ramsey*, Dkt. No. 75-1275 (D.C. Cir. June 10. 1976). In that case Ramsey's conviction for violation of the federal narcotics laws, and consequent 30-year sentence, was reversed. The reversal was based on that Court's determination that a postal search of envelopes containing heroin addressed to Ramsey violated the Fourth Amendment. The Supreme Court has granted certiorari. *United States* v. *Ramsey*, 45 U.S.L.W. 4222 (Oct. 7, 1976).

Rufus Wesley	May 7, 1976	8 years to be followed by a three-year term of special parole.
Al Green	May 27, 1976	8 years to be followed by a three-year term of special parole.
Henry Salley	May 14, 1976	5 years to be followed by a three-year term of special parole.

The defendant Basil Hansen escaped from the Metropolitan Correctional Center on April 11, 1976 and was, therefore, not sentenced. He is the subject of *United States* v. *Basil Hansen*, 76 Cr. 651 (KTD), filed July 15, 1976, charging escape from a federal prison in violation of Title 18, United States Code, Section 751(a).

Defendants Taylor, Turner, Ramsey and Wesley are presently serving their sentences. Defendants Green and Salley are at liberty pending the determination of this appeal.

Statement of Facts

The Government's Case

1. Introduction: Nature of conspiracy

The evidence at trial established that from early 1970 through 1973 the appellants, their co-defendants and many others in New York and Washington operated a heroin network which brought multi-kilogram quantities of narcotics, principally heroin, to dealers in New York and Washington, D.C. The conspiracy proven at trial is an extension of that proven in *United States* v. *Carmine Tramunti*, 513 F.2d 1087 (2d Cir. 1974), *cert. denied*, 423 U.S. 823 (1975). The appellants herein, and their co-defendants, are best characterized as wholesalers of the heroin sold by that part of the Tramunti

organization headed by Joseph DiNapoli. Joseph DiNapoli was in partnership with Francis X. Pugliese, who was the original source of narcotics wholesaled by Warren Robinson and the conspirators charged in this case. *Cf.* 513 F.2d at 1097, 1099.

Warren Robinson used his own organization to sell the heroin in Washington which he and his partner, Thomas "Tennessee" Dawson had purchased from Pugliese and Pugliese's associate, Paul DiGregorio. Robinson's organization included his steady customers, among them appellants Al Taylor, William Turner, Charles Ramsey, and the fugitive defendant Ronald Sweeney. These customers regularly marketed the heroin which Robinson supplied in the Washington, D.C. metropolitan area.

Other defendants—Henry Salley, Rufus Wesley, Cecil Tate, James March—assisted Robinson in transporting, storing, diluting, and delivering heroin in Washington. They performed these roles at various times, but always in a cooperative, rather than competitive, way. Another defendant, Walter John Smith, supplied lactose regularly to the organization in exchange for narcotics and cash.

Arhelia Miller and Ernestine Barber, Robinson's girlfriends in Washington and New York, respectively, played minor roles but often assisted the operation by taking messages or concealing heroin for transportation. The same was true of the acquitted defendant Bryant Ferguson, an employee at Robinson's haberdashery in Washington.

Pugliese, of course, had other customers besides Robinson. These included Al Green and Basil Hansen who operated in New York and purchased substantial quantities of heroin from Pugliese. Pugliese had assistants,

including Harry Pannirello, Pat Dilacio and Joseph LaSalata. LaSalata performed the role of a stash. Another, Paul DiGregorio was Pugliese's lieutenant and agent and delivered drugs, money and messages for Pugliese. DiGregorio performed this role until June 1971, when he went to jail. Dorethea Ann Ellis, who was DiGregorio's girlfriend, helped DiGregorio, as well as Pugliese, and other members of the conspiracy, in their efforts to distribute narcotics.

In October 1971, Pugliese was unable to continue his operation because he went to jail. Pugliese designated Harry Pannirello and Pat Dilacio to head his narcotics business during his absence. In January 1972, Harry Pannirello hired his brother-in-law Jimmy Provitera to make deliveries. Robinson's Washington operation and Pugliese's New York customers continued to deal with Pannirello and Dilacio on the same basis as they had with Pugliese.

In sum, the conspiracy revolved around a core group of Pugliese, DiGregorio, Pannirello and Dilacio. This core group served as the hub around which multi-kilogram quantities of narcotics were purchased and distributed further along the conspiratorial chain proven in the *Tramunti* case.

The conspiracy was proven by the testimony of Thomas "Tennessee" Dawson, Harry Pannirello and Jimmy Provitera, all of whom testified in the *Tramunti* case, and two other defendants who pleaded guilty and testified, James March and Dorethea Ann Ellis. The testimony of the five accomplices was extensively corroborated by many other witnesses and exhibits.

2. The Hub: Pugliese's operation in New York

In March of 1970 Frank Pugliese,* an active narcotics wholesaler, asked Harry Pannirello,** then a construction worker in New Jersey, to store heroin for him and to deliver it on request. (Tr. 1866-68, 2069-72).*** Pannirello began to do so. Shortly thereafter, Pugliese introduced Pannirello to some of his narcotics customers. On one occasion Pugliese took Pannirello to an apartment building at 1380 University Avenue in the Bronx. There Pugliese introduced Pannirello to Basil Hansen, Basil's girlfriend Bunny, and Hattie Ware in the latter's apartment on the eleventh floor.**** Pannirello left one or two packages of heroin for Hansen. (Tr. 1874-75, 2057). On another occasion, Pugliese took Pannirello to an apartment on the seventh floor of the same building where he introduced him to Al Green. Pugliese told Green that Pannirello would be delivering the heroin to Green in the future. Green agreed to this arrangement, and thereafter, Pannirello delivered two packages of heroin to Green. (Tr. 2058-59).

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* Frank Pugliese, a defendant convicted in *Tramunti*, cf. 513 F.2d 1087, 1097, was known as "Butch" and as "Georgie" (Tr. 1871-72). Testimony about him therefore referred to him by these names.

** Pannirello testified for the government as he did in *Tramunti*.

*** "Tr." refers to the trial transcript; "Tr." followed by a date refers to a pre-trial conference or other proceeding on the specfiied date; "S." refers to the transcript of jury selection of January 29 and 30 and February 3 and 4, 1976; "JA" refers to Appellants Joint Appendix; "App." refers to the Appendix of the specified defendant; "GX" refers to Government Exhibits"; "DX" refers to Defense Exhibits; and "Br." refers to the brief on appeal of the specified defendant.

**** A photograph of Pugliese, the two Hansens, and Hattie Ware, taken at a nightclub, was seized from the Hansen apartment on October 4, 1973 and was introduced at trial below. (Tr. 2840; GX 58A). Hattie Ware, a defendant convicted in *Tramunti*, was the aunt of Hansen's girlfriend Bunny. Most of the transactions between Hansen and Pannirello took place in Hattie Ware's apartment.

During 1970 Pugliese was also selling heroin to Paul DiGregorio.* DiGregorio, in turn, sold the heroin to several New York customers and to Warren Robinson at Warren's Men's Shop on Georgia Avenue, N.W., Washington, D.C. (Tr. 74; 1418-19). DiGregorio continued his participation until June 1971, when he was arrested and jailed. (Tr. 146-47, 1436, 3221). In the spring of 1971, after DiGregorio was jailed, Pugliese could no longer use him as his middleman for deliveries of heroin to the Robinson organization in Washington. Consequently, Robinson, and his partner, Dawson, traveled to New York where they purchased heroin directly from Pugliese. (Tr. 149, 154-57, 160, 1455-57).

In October 1971, Pugliese went to jail. Dawson made a special trip to New York to say goodbye. (Tr. 234-36). Pugliese called Pannirello to have him take over his business with another Pugliese associate, Pat Dilacio.** (Tr. 2063-66, 2077-80). He gave the phone numbers of his customers—Al Green, Hattie Ware, Tennessee Dawson, John Barnaba—to Pannirello, and gave Dilacio the phone number of his source, Joseph DiNapoli.*** He also told Dilacio and Pannirello to collect a $10,000 debt from Basil Hansen. (Tr. 2078-79).

3. Pannirello and Dilacio take over Pugliese's New York operation

Before going off to jail, Pugliese left Dilacio and Pannirello two kilograms of heroin and directed them to store it in a garage off Westchester Avenue in the Bronx. (Tr. 2080-81, 2409-10; GX 55, 56). Later in

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* DiGregorio was named in this case as an unindicted co-conspirator, as he had been in the *Tramunti case*. 513 F.2d at 1099 n. 17.

** Dilacio, a defendant named in the *Tramunti* indictment, has never been apprehended.

*** John Barnaba testified for the Government in *Tramunti*. Joseph DiNapoli was convicted in *Tramunti*. 513 F.2d at 1097.

the fall of 1971, Dilacio bought an additional two kilograms from Joseph DiNapoli. (Tr. 2084-85). Pannirello sold these two heroin shipments to Dawson, Green and Hansen. (Tr. 2072, 2083, 2087).

During late 1971 there was a drug "panic" when heroin became unavailable. Pannirello was unable to get heroin from DiNapoli, and Dawson was, in turn, unable to get any from Pannirello. (Tr. 249-50, 2093). In February 1972, Pannirello and Dilacio decided to get in touch with Carmine Pugliese, Frank's brother, as a possible source for narcotics.* Carmine Pugliese entered into a separate agreement with Dilacio and Pannirello. Pannirello began to pick up heroin from Carmine Pugliese and stored it in John Gamba's house.**

At approximately the same time, early 1972, Pannirello recruited his brother-in-law Jimmy Provitera to work as his courier. (Tr. 2087-8, 2499-2500).*** Just as Pugliese had introduced Pannirello to the New York customers, Pannirello took Provitera to 1380 University Avenue to meet Hansen, Hattie Ware, William Alonzo, and Green. (Tr. 2099-2100, 2501-03).**** Pannirello and Provitera delivered one package of heroin to Hansen and one to Green. (Tr. 2100, 2503).***** Pannirello told

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* Carmine Pugliese, a defendant in the *Tramunti* indictment, was a fugitive until July 29, 1976 when he was found murdered in upper Manhattan with ten bullets in his upper body.

** John Gamba was tried and convicted in *Tramunti*.

*** Provitera testified for the Government at trial as he did in *Tramunti*.

**** Alonzo, who was indicted in *Tramunti* as "Butch Ware," was Hattie Ware's brother. He was convicted, but his conviction was reversed on the ground that his participation in that conspriacy was not sufficiently demonstrated. 513 F.2d 1087, 1112.

***** It was stipulated between Green and the Government that Green lived in Apartment 7-D, 1380 University Avenue from September, 1969 to March, 1972. (Tr. 2990).

Green that Provitera would be delivering for him, but Green refused and insisted that Pannirello himself make the deliveries. Pannirello left the apartment with a bag of money and paid Provitera $200 for the night's work. (Tr. 2100, 2503-05).

Thereafter, Provitera and Pannirello made regular deliveries of heroin to Green. (Tr. 2505-06; 2128). The deliveries to Green stopped after an incident in April, 1972. Pannirello and Provitera had arranged to meet Green at Yankee Stadium in order to set up a new place for deliveries.* However, Green never showed up. Pannirello telephoned Green, but no agreement was reached for future deliveries of heroin. Green was not heard from again. (Tr. 2131-32; 2509-10). In sum, Pannirello had narcotics dealings with Green on ten to fifteen separate occasions. (Tr. 2132).

Deliveries to Hansen continued until Hansen began to fall behind on his payments and ultimately owed Pannirello between $40,000 to $50,000. (Tr. 2125-27, 2511-2514). Pannirello stopped his deliveries to Hansen in the spring of 1972. (Tr. 2139, 2514). Pannirello delivered narcotics to Hansen ten to fifteen times. (Tr. 2148).

4. The Robinson organization in Washington

In addition to supplying the New York customers, Pannirello and Provitera were delivering heroin to the Washington customers. These deliveries were made at a Howard Johnson's motor inn in New Jersey. (Tr. 2088-92, 2136-38, 2515-16, 2524-28, 2533-37).

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* The switch was necessary because there had been a narcotics "bust" at 1380 University Avenue. (Tr. 2127-28). The testimony about the "bust" was stricken and is more fully discussed in Point XXI, *infra*.

A. The DiGregorio connection

In late 1970 Robinson established his heroin connection with DiGregorio in New York. Robinson met DiGregorio through a man named "Black Sammy" who had given up his heroin dealings in favor of cocaine and bequeathed his heroin connection to Robinson. (Tr. 93; GX 6).

In early 1971 the relationship between Robinson and DiGregorio was threatened after Robinson refused to pay for some heroin claiming it was of poor quality. Thomas "Tennessee" Dawson, an acquaintance of Robinson, intervened and paid off DiGregorio thus ending the controversy. (Tr. 76-82, 91, 84; GX 5).* DiGregorio met Dawson later that same week and told him that Pugliese "wanted to see the man who was willing to pay a bill for Warren." (Tr. 95). Dawson and DiGregorio drove to New York where Dawson and Pugliese met. (Tr. 94-47). Pugliese complained that Robinson and DiGregorio were giving him trouble over money and that he would continue to supply them with narcotics only if Dawson undertook to guarantee payment. (Tr. 97). Dawson received a half kilogram of heroin from Pugliese after that meeting, and conveyed it to Robinson who later paid Dawson $1,000 as his share of the proceeds. (Tr. 100).

DiGregorio delivered narcotics to Robinson or Dawson every week to ten days throughout the early part of 1971. (Tr. 105, 107-09, 139-41, 142-44, 145-46). In late June 1971 DiGregorio went to jail.

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* Dawson, who pleaded guilty in the *Tramunti* case, testified for the Government as he did in *Tramunti*. On October 6, 1976 he received a suspended sentence.

B. The Robinson-Wesley-Dawson partnership

Shortly after DiGregorio's imprisonment, Dawson received a phone call from DiGregorio's girlfriend, Dorethea Ann Ellis, who said that Pugliese wanted to see him in New York. Dawson drove to New York where Pugliese told him they would deal directly with each other from that point forward. Dawson received a quarter kilogram of heroin and returned to Washington. (Tr. 149, 154-57, 160, 1455-57). Thereafter, Robinson traveled to New York with Dawson and attempted to persuade Pugliese to deal with him. However, Pugliese held fast to his decision to deal with Dawson rather than Robinson. (Tr. 159-69).

Dawson thereafter began to have Rufus Wesley accompany him to New York. Dawson had met Wesley in early 1971 through Robinson who had persuaded Dawson to hire Wesley to work at Dawson's bar, "Tennessee's Playroom." (Tr. 126-28). Later, Robinson and Dawson cut Wesley in on their narcotics business. (Tr. 135-36). Wesley, Robinson, and Dawson evolved a partnership during the summer of 1971 whereby the narcotics they received from Pugliese were cut and sold for a price between $18,000 to $22,000 per half kilogram. The cut heroin, which was stored in Wesley's apartment in Landover, Maryland, was sold by Robinson. (Tr. 187).

Wesley eventually suggested to Dawson that they should cut Robinson out of the partnership because Robinson had held back in paying them the proceeds of his sales, but the idea was squelched because only Robinson was in a position to sell the quantities of narcotics that Pugliese was supplying. (Tr. 172-77).

Throughout the summer Dawson and Wesley made several trips to a spot near Co-op City in the Bronx to pick up narcotics from Pannirello. (Tr. 157-61, 177-80, 198-205, 2067-69). On each occasion, Dawson and Wesley

returned to Wesley's apartment in Maryland where, together with Robinson, they cut the heroin and prepared it for sale. (Tr. 201). On the last such trip Pannirello told Dawson that he would meet him at a new location, a Howard Johnson's Motor Inn off Route 46, Ridgefield Park, New Jersey. (Tr. 203-07, 2088-89).

In the fall of 1971, Wesley, Robinson and a friend of Wesley's named "Mouthpiece" began to make the pick-ups of heroin from Pannirello without Dawson. (Tr. 243-44, 2089-91). (Tr. 2090-91). Wesley first picked up a half kilogram of heroin for $16,000, some of which Wesley paid in advance. On a second occasion Pannirello delivered another package to Wesley who failed to pay him. Dawson later reimbursed Pannirello and explained that Wesley had begun to use drugs, had become unreliable, and had been cut out of the partnership. (Tr. 244-45; 2093).

C. The customers of the Robinson organization

Robinson's regular customers during 1971 included Al Taylor, William Turner, Charles Ramsey, James March, Ronald Sweeney, Tommie Farmer, and a man named "Contee." (Tr. 177, 185-86, 192-94; 226).

1. Charles Ramsey

During the summer of 1971 Charles Ramsey emerged as one of Robinson's principal customers in Washington. The heroin Ramsey received from Robinson could only be cut three to four times instead of the seven to nine times that Robinson promised. Ramsey complained to Dawson on one occasion that he should have been getting higher quality narcotics because he was paying "front money." He asked Dawson to introduce him to "the connection" in return for which Ramsey would pay the full amount in advance. (Tr. 190). Ramsey was never introduced, however, and continued to purchase from Robinson.

In late October 1971, Dawson, Robinson and James March, a Robinson lieutenant, made a trip to New Jersey for narcotics and returned to the apartment of Robinson's girlfriend, Arhelia Miller, in Silver Spring, Maryland.* There they cut the narcotics for Ramsey who arrived in the middle of the process. (Tr. 242, 245-46, 909-11). Ramsey demanded one and a half kilograms, and Robinson was prepared to give him only one. Robinson insisted that Ramsey pay him $9,000 which Ramsey owed. Ramsey refused. The argument continued until a disgruntled Ramsey left the apartment with the one kilogram that had already been prepared. (Tr. 246-47, 910-11).

Shortly after this, March who had served Robinson for almost two years by cutting, packaging, and delivering narcotics, became a drug user and was dismissed by Robinson. (Tr. 827, 917-18). March turned to Ramsey who offered March some "scramble," which is heroin that has been cut as many times as it is possible to cut it without destroying its effect upon injection. (Tr. 924-26). March got an ounce and a half from Ramsey, sold some of it, used some of it, but never paid Ramsey the $1,200 he was supposed to. (Tr. 927-28).

2. William Turner**

In February, 1972 Dawson and Robinson picked up heroin from Pannirello in New Jersey and returned to Robinson's girlfriend's apartment in Maryland. (Tr. 267-68, 272-274, 1337-40; GX 26, 27, 28, 29, 30, 31). Robin-

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* James March pleaded guilty and testified for the Government at trial. He is scheduled to be sentenced on October 20, 1976.

** Although designated here as a "customer," Turner had been a supplier to the Robinson organization in 1970 and early 1971. Robinson purchased heroin from Turner on two occuasions during the summer of 1970, and attempted to purchase more in February, 1971 when Turner had five kilograms for sale. (Tr. 194-97, 824-27).

son told Dawson that Turner would be coming by. While Dawson and Robinson were cutting the heroin, Turner knocked on the door and came in. There were three piles of the narcotics, each of different strengths, on a table and Robinson gave Turner a spoon of each kind as a sample for testing. Turner said he would buy all that Robinson and Dawson could supply if the quality of the narcotics proved to be good. (Tr. 274). Robinson told Dawson a few days thereafter that Turner had not liked the samples. (Tr. 275).

A month later, Turner met Robinson in New York after Robinson, together with Dawson and March, had picked up two kilograms from Pannirello in New Jersey. (Tr. 279, 987). The heroin was then brought to Ernestine Barber's apartment in the Bronx where Robinson and March cut the heroin with confectionary sugar.* (Tr. 280). After cutting it Robinson and Dawson went to meet Turner in a hotel in Manhattan. (Tr. 281; 980). After they left, Turner called Barber's apartment and spoke to March who told him that Robinson was on his way to meet him. (Tr. 980). Robinson, in the meanwhile, delivered the heroin to Turner and was paid $19,000 in cash. (Tr. 281-82, 981).**

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* Robinson usually cut his heroin with lactose which he received from defendant Walter John Smith who ran Roger's Surgical Supply Store on 9th Street in Washington. (Tr. 162-69, 227-28, 966-73). Smith was paid either in cash or narcotics. (Tr. 169, 967). On June 30, 1972 Smith was arrested by agents of the Drug Enforcement Administration for the sale of heroin and cocaine. (Tr. 686-88, 774, 779; GX 20B, 21D, 21E). After the arrest a search warrant was executed on Roger's Surgical Supply Store, where two containers of lactose were seized by the narcotics agents. (Tr. 756-58; GX 23, GX 24).

** During the spring of 1972, a kilogram of heroin wholesaled for approximately $37,000. (Tr. 978).

3. Al Taylor

Al Taylor began purchasing heroin from Robinson in March, 1971 and continued to do so until September, 1972. After Dawson and Robinson first purchased heroin from DiGregorio, they sold some of it to Taylor who was late in paying. Taylor later explained that he sold the narcotics on consignment and had not been paid himself. (Tr. 110-13).

By the summer of 1971, Taylor had established himself as a regular customer, but his difficulties in paying so plagued him that by late 1971 Robinson refused to sell Taylor any more narcotics. (Tr. 194, 257). Taylor approached Dawson for narcotics, but Dawson turned him down because he was Robinson's customer. Taylor said that Robinson had cut him off because he had "messed up before." Dawson said he would talk to Robinson on Taylor's behalf, but never did. (Tr. 257).

During the summer of 1972, Taylor had visited Warren's Men's Shop and eventually persuaded Robinson to supply him again. (Tr. 1002). Robinson, Taylor, and March thereafter drove to Robinson's stash at Henry Salley's apartment. There March delivered an ounce of heroin to Taylor. (Tr. 1003-04).

By September, 1972 Taylor had still not paid for this heroin. In an effort to get Taylor to pay, Robinson and March visited Taylor at his girlfriend's home on Mount Pleasant Street. (Tr. 1018-19). At that meeting, Taylor paid Robinson for the previous package, and Robinson gave Taylor an ounce and a half of heroin. (Tr. 1020). After this transaction Robinson complained that Taylor was still unreliable and, although he had supplied Taylor with as much as an eighth kilogram at a time, he could not afford to do any more business with him. (Tr. 1021-22).

D. Later developments in the Robinson organization

1. Henry Salley

In June, 1971 Robinson, whose narcotics operation began to expand, started using Henry Salley's house to cut and to stash heroin. (Tr. 869-75). A year later, Salley was selling heroin to customers in Washington on his own and was traveling to New Jersey with March to pick up heroin from Pannirello. (Tr. 992-98).

After a "dry spell" during the late summer of 1972 when no narcotics were available, Robinson and Salley went together to New Jersey for the meetings with Pannirello and Provitera. (Tr. 2132, 2135, 2530-34). At the initial meeting, Robinson said that Salley was working for him and that Provitera should deliver to Salley. (Tr. 2534). Two weeks thereafter, Salley and Provitera met at Howard Johnson's at which time Provitera gave Salley a package of heroin. (Tr. 2534-A). At another meeting Salley appeared at the Howard Johnson's to tell Pannirello and Provitera to wait for Robinson who was on his way from Washington and would be there shortly. (Tr. 2136-37, 2534-35). Robinson finally arrived in a taxicab, and Pannirello and Provitera went with him to Salley's motel room where Robinson, in Salley's presence, complained that he was having trouble "selling the dope" because it was of poor quality. Robinson, nevertheless, paid Pannirello $19,000, part of which, $14,000, represented "front money" for one kilogram of heroin which was delivered the following night. (Tr. 2138-39, 2536-37, GX 63).

E. The retirement of Dawson, the brief return of DiGregorio, and the arrests of Pannirello and Provitera

During the summer of 1972, when the Pannirello connection was not servicing Robinson's needs, Paul DiGregorio, momentarily out of jail, took up the slack.* He had moved into the motel portion of the Twin Towers complex in Silver Spring, Maryland with Dorethea Ann Ellis.** DiGregorio told Ellis that Charles Ramsey had been complaining about the quality of the narcotics which he had been receiving from Robinson and had termed it "Ajax." DiGregorio said that he could not understand these complaints because he had been giving Robinson top shelf stuff. (Tr. 1479-80).

Around this time, Dawson retired from the narcotics business except insofar as he acted as an informant on behalf of the Drug Enforcement Administration. In late 1972 Dawson introduced an undercover agent to Pannirello which ultimately led to the arrests of Pannirello and Provitera. (Tr. 287; 514-16; 2154-56).

5. Ramsey's efforts to establish a New York connection

Subsequent to the arrests of Pannirello and Provitera and in view of his earlier disagreements with Robinson,

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* DiGregorio was imprisoned on June 23, 1971 on a New York State narcotics charge, to serve one year. He was then indicted in Baltimore by a federal grand jury in Baltimore. He finished serving the New York sentence in May of 1972 and was released until August, 1972 when he was arrested on a weapons charge in Washington. He was thereafter removed to Baltimore to stand trial on the federal indictment. He was convicted and was sentenced to 40 years' imprisonment. (Tr. 1440-41, 1654, 3280).

** Dorethea Ann Ellis pleaded guilty to the conspiracy count and testified for the Government. On July 27, 1976 she was given a suspended sentence.

Ramsey attempted to establish his own connection in New York for heroin. On one occasion Ramsey succeeded in getting some cocaine from Dorethea Ann Ellis, who had driven to New York and purchased it there from Buddy Drake, an old supplier of DiGregorio's. (Tr. 1501).* She returned to Washington, where she delivered the cocaine to Charles Ramsey through her boyfriend, James Kelly. (Tr. 1540). A couple of weeks after this transaction Ellis drove to Mt. Vernon, New York with Ramsey and Kelly to approach Drake about supplying heroin. Ellis spoke to Drake and his partner, a man named "Gus", about supplying heroin, but they declined to supply Ramsey and Ellis. (Tr. 1546-48). Later Ramsey approached "Gus" himself but with no success. (Tr. 1549).

Ramsey, however, continued his efforts to establish a heroin connection for narcotics in New York. (Tr. 1549-50). Ramsey, Kelly, and Ellis again drove to New York, this time to see whether they could obtain narcotics from Frank Pugliese. They drove to the vicinity of Westchester Avenue in the Bronx where Ellis had seen DiGregorio meet Pugliese in the past. (Tr. 1551-52). Ellis asked a woman where Pugliese lived. They never found Pugliese, and Ellis told Ramsey that Pugliese was "still away." (Tr. 1553-55).**

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* In June of 1972, James March had gone to New York at Robinson's direction, met DiGregorio, and paid him approximately $6900 to get them some heroin. (Tr. 1004-11, 1465-68). DiGregorio gave the money for the narcotics to Buddy Drake but never received the narcotics. (Tr. 1011-16, 1471-72). Robinson came to New York later with March and threatened to "croak" (kill) DiGregorio unless he got the money back from Drake. (Tr. 1016). DiGregorio got the money back from Drake but Robinson was never repaid the money. (Tr. 1016, 1472). Drake was named as an unindicted co-conspirator. (Tr. 1506).

** The woman Ellis met on the street told Ellis that Pugliese was still in jail, but Ellis was permitted to testify merely that she told Ramsey that Pugliese was still away. (Tr. 1556-56).

The Defense Case

1. Al Taylor

All Taylor called his daughter Gwendolyn Bellfield, who had been previously called by the defendant Arhelia Miller. Bellfield testified that her father was protective of her and that her father and James March had had an argument between 1970 and 1973. (Tr. 3288-89).

Taylor also called Evelyn Goldring, an employee of a real estate firm in Washington, D.C. who testified that during September, 1971 Al Taylor's girlfriend, one Breda Hines, lived in Apartment #1 located in the basement or on the first floor of 3348 Mount Pleasant Street, Washington, D.C. (Tr. 3333). She further testified that on December 24, 1971 Hines transferred from Apartment #1, 3348 Mount Pleasant Street to Apartment #11, 3342 Mount Pleasant Street where she remained until December, 1974. (Tr. 3342-43).

2. Basil Hansen

The defendant Hansen called Special Agent John J. Nolan of the Drug Enforcement Administration to establish that the witness Harry Pannirello had been shown photographs of Hansen from a photograph album seized from Hansen's apartment at the time of his arrest. Defense counsel also elicited the circumstances of the arrest of Hansen's then wife, "Bunny." (Tr. 3436-44).

3. Arhelia Miller

Miller called Gwendolyn Bellfield, Al Taylor's daughter. She testified that she did not see any narcotics on a visit she made to New York with Dawson, Miller, Robinson and Julian Hailes, a/k/a "Bebe". Miller also called Minota Claggett to dispute the details of Dawson's account of another trip to New York. (Tr. 3592).

4. Bryant Ferguson

Ferguson took the stand in his own behalf and denied his participation in the narcotics conspiracy to which Dawson and March had testified. Specifically, he denied that he had ever distributed or possessed heroin as Dawson and March had testified he had. (Tr. 3351-56). Ferguson also called Julian Hailes, who disputed Dawson's recounting of the same trip which Bellfield had disputed in her testimony. (Tr. 3208). Finally, Lucille Johnson, a former personnel analyst with the county government of Prince George's County, Maryland testified that Ferguson had worked for the county until he was indicted (Tr. 3318-19).

5. Rufus Wesley

Rufus Wesley offered a stipulation that he was indicted in the case below on or about July 28, 1975 and that after September 5, 1972 he was not in the Washington, D.C. metropolitan area, including Maryland, nor in the Southern District of New York. (Tr. 3495-96, 3499-3500).*

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* The latter stipulation was framed in the negative to avoid reference to the fact that Wesley was imprisoned on or about September 5, 1972 on charges of concealment of, and assault with, a dangerous weapon. (Tr. 3462-63).

ARGUMENT

POINT I

The evidence was more than sufficient for the jury to convict Taylor and Turner on the conspiracy count.

Taylor and Turner claim that the evidence was insufficient to convict them and that the evidence against them showed only an isolated act insufficient to prove their involvement in the conspiracy. These arguments are meritless.

1. Al Taylor

The proof showed Al Taylor's direct and personal involvement with the Robinson organization in Washington for a period of eighteen months during 1971 and 1972.

After the first delivery by DiGregorio to Dawson and Robinson in Washington, Robinson told Dawson that some of the heroin they had received had gone to Al Taylor. Dawson and Robinson confronted Taylor about his failure to pay. Taylor said that "he had let someone else have the narcotics and they hadn't paid him, but that he was going to pay the money." (Tr. 113).*

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* This testimony clearly refutes Taylor's innuendo that he was a narcotics addict and that the narcotics he purchased were for his own use. (Taylor Br. 8). Taylor's brief asserts the following testimony of Dawson as support for the "strong inference" he asks this Court to draw:

> (By counsel for Taylor.)
> "Q: Do you know if Al Taylor is a junkie?
> A: No, I don't.
> Q. He could be and you wouldn't know it?
> A: That is true." (Tr. 332).

Obviously the quoted passage suggests nothing about Taylor being an addict. In any event, there is no reason why a narcotics addict should be immune from prosecution for conspiracy to violate the federal narcotics laws where the government has proof that he promoted the venture.

By the summer of 1971 Taylor had become one of Robinson's principal customers. (Tr. 192, 1087). Taylor purchased as much as one eighth of a kilogram from Robinson at one time, but Robinson cut him back from that level because he did not pay promptly.* In early 1972 Taylor was still dealing heroin, but his source, Robinson, was refusing to supply him because he had "messed up." Taylor then asked Dawson to supply him with narcotics. Dawson agreed to speak to Robinson about Taylor, but Taylor was sure Robinson would not supply him. (Tr. 257).

Taylor did, however, resume dealing with Robinson, though in small amounts. He bought one ounce from Robinson and March in the late summer of 1972, and then an ounce and a half in September, 1972. (Tr. 1004, 1021-22).**

It is apparent from the foregoing that Taylor is not "entitled to the benefit of the single act line of cases". *United States* v. *Tramunti*, *supra*, 513 F.2d at 1112; *United States* v. *Reina*, 242 F.2d 302, 306 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957); *United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971). Taylor dealt repeatedly with a central figure in the con-

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* The additional suggestion that Taylor's poor payment record implies addiction is unsupported by the trial record. The evidence was replete with evidence of tardy payments by others, including Robinson, DiGregorio, Wesley, and Ronald Sweeney. (Tr. 97, 123-24, 917-18, 1016). Only Wesley among them became an addict and he was transporting large amounts of heroin from New Jersey to Washington when he began to use drugs. (Tr. 917-18).

** Although these amounts are small in relation to the kilogram weights which were being sold in New York and Washington, the price was at least $1000 for one ounce, the quality of which allowed for the heroin to be cut three or four times more. (Tr. 138, 190).

spiracy—Robinson—and, in so doing, became familiar with at least two other central figures—Dawson and March. Moreover, on each occasion when Taylor met with Robinson, Dawson, or March, narcotics were delivered, or paid for, or discussed.

In contrast, William Alonzo, in *Tramunti*, *supra*, only received heroin from Pannirello on one occasion, and although it was clear he knew other co-conspirators and was present during a delivery by Pannirello to Hansen, he did not further participate in, or contribute to the success of, the conspiracy charged. 513 F.2d 1087, 1112.* Taylor, on the other hand, was purchasing up to one-eighth kilogram quantities of heroin throughout the course of the conspiracy. Although these quantities were individually less than what other purchasers were sold from time to time, the aggregate purchased from Robinson was of a magnitude which would amply support the inference that Taylor had knowledge of, and acquiesced in, a larger conspiratorial scheme." *United States* v. *Magnano*, Dkt. No. 76-1011 (2d Cir. Sept. 7, 1976) slip op. 5471, 5475. Further, the regularity of Taylor's purchases, at least in the summer of 1971, justifies the inference that Taylor knew he was involved in a broad criminal enterprise. *United States* v. *Hinton*, Dkt. No. 75-1402 (2d Cir. Sept. 27, 1976) slip. op. 5679, 5702. *United States* v. *LaVecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975).

2. William Turner

There was both sufficient independent evidence of Turner's participation in the conspiracy to warrant the admission of hearsay declarations of co-conspirators

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* Taylor is likewise not entitled to be characterized as an "minnow" who may wriggle free of the mesh of the conspiracy net. *Id.* In the context of the conspiracy he was, as set forth *supra* at 17, 24, a "principal customer" of Robinson wholly apart from his being a prior federal narcotics felon. *Supra* at 4.

against him and sufficient evidence for the jury to convict him on the conspiracy count.*

In order for the hearsay declarations of co-conspirators to be admitted against a defendant there must be non-hearsay evidence showing "a likelihood of an illicit association between the declarant and the defendant . . . ." *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). Such association must be shown "by a fair preponderance of the evidence independent of the hearsay utterances." *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

The independent, non-hearsay evidence adduced against Turner easily reaches the threshold required by *Ragland* and *Geaney*. In February, 1972 Turner came to Robinson's apartment in Silver Spring, Maryland. Robinson was cutting narcotics when Turner arrived and gave Turner a sample of each of three different strengths which were before him on the table. Turner said that if the narcotics were good, "they [Turner and associates] would buy all that we [Robinson and Dawson] could supply." (Tr. 274).

The independent evidence only begins with this receipt of narcotics. There was also evidence that Turner visited Robinson frequently at Warren's Men's Store and that he

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* Turner's claim is an amalgam of two theories: first, he claims that there was insufficient non-hearsay evidence to justify the submission of the case to the jury, and secondly, he claims that the one clearly non-hearsay act was a single act within the meaning of *United States* v. *Reina* and *United States* v. *Aviles*, *supra*. These contentions will be discussed as if they raised the questions whether (1) the independent, non-hearsay evidence warranted the admission of statements made by his co-conspirators against him and (2) whether all the evidence, hearsay and non-hearsay, was sufficient for conviction.

spoke privately with Robinson there. (Tr. 6[illegible], 825). Dawson also testified that he visited Turner's home with Robinson. (Tr. 194-97). In addition during an independent investigation of his narcotics activities, Turner was observed by Drug Enforcement Administration agents arriving at his home with his co-defendant Cecil Tate (Tr. 1396-1400). The participation of Robinson, Dawson, and Tate in large narcotics transactions in the course of the conspiracy was established by ample direct proof. *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 19[illegible]) *cert. denied*, 417 U.S. 936 (1974).

Finally, in March, 1972 Robinson and Dawson left Ernestine Barber's apartment to deliver a kilogram of heroin. Before Robinson left, he told March that "they were going in town to meet Dog" and that "[i]f he called, to tell Dog, they were on their way." * Later, Turner called March who told him that Robinson was on his way to meet him. Robinson, of course, visited a Manhattan hotel with the kilogram of heroin and came back with a bag of $19,000. (Tr. 281-82)**

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* Robinson's statement, to which March testified, may be regarded as non-hearsay evidence for *Geaney* purposes because it is a verbal act which consisted of an instruction to a co-conspirator. *United States* v. *Nuccio*, 373 F.2d 168, 173-74 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Annunziato*, 293 F.2d 373, 376-77 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *See also United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974); *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

** Turner's brief ignores the facts of the Manhattan delivery, apparently because of his acquittal on Count Ten, which charged this transaction as a substantive offense. The law, however, is settled that acquittal on one count does not preclude reliance on its evidence for proof of other counts. *United States* v. *Finkelstein*, 526 F.2d 517, 327 (2d Cir. 1975), *cert. denied*, — U.S.L.W. — (1976); *United States* v. *Sisca*, 503 F.2d 1337, 1344 n. 9 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Zane*, 495 F.2d 683, 689-92 (2d Cir. 1974).

The totality of this independent evidence, consisting of receiving samples of narcotics from Robinson, having secret conversations with him and meetings with other conspirators, as well as the circumstantially strong inference (considering only the non-hearsay acts and declarations) that Turner received the kilogram of heroin in New York, is plainly sufficient to meet the standards set forth in *Ragland* and *Geaney*, *supra*. *United States* v. *Joyce*, Dkt. No. 76-1182 (2d Cir. Sept. 20, 1976) slip op. 1, 5n. 10; *United States* v. *Lam Lek Chong*, Dkt. No. 75-1435 (2d Cir. Sept. 27, 1976) slip op. 5725, 5734-35; *United States* v. *Payden*, 536 F.2d 541, 543-44 (2d Cir. 1976). *See United States* v. *D'Amato*, 493 F.2d 359, 362-365 (2d Cir. 1974); *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Ruiz*, 477 F.2d 918, 919 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973). See *also*, *United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885, 889-890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Calarco*, 424 F.2d 657, 660 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Vasquez*, 429 F.2d 615 (2d Cir. 1970).

Turner does not appear to concede that, once the hearsay statements are admitted, the evidence of his participation in the conspiracy is more than sufficient. It is clear, however, that Turner's attempt to avail himself of the single act doctrine is no more persuasive than Taylor's. The proof shows that Turner sold narcotics to Robinson in 1970 and had more narcotics for sale in early 1971. (Tr. 197, 827). The proof of the receipt both of the three heroin samples in February, 1972 and the kilogram in Manhattan shows conclusively that Turner knew of and joined in "a larger conspiratorial scheme." *United States* v. *Magnano*, *supra*.

POINT II

The jury properly found a single conspiracy.

Taylor, Wesley, and Green seek reversal of their convictions on the ground that the evidence at trial showed multiple conspiracies rather than the single conspiracy charged in the indictment.* Wesley also argues that the trial court's charge concerning multiple conspiracies was erroneous and requires reversal. These allegations, which are "usual in narcotics conspiracy cases," *United States* v. *Magnano*, Dkt. No. 1011 (2d Cir. Sept. 7, 1976) slip op. 5471, 5473, are groundless.

A. Single conspiracy

Any consideration in this case of multiple conspiracies, must begin with this Court's finding in *United States* v. *Tramunti*, *supra*, that the evidence showed a "single, loosely-knit conspiracy," one "linked together by cooperation, trust, and a mutual source of supply." 513 F.2d at 1106-07. The issue before the Court in *Tramunti* was whether the existence of independent spheres of narcotics activities—one headed by Louis Inglese and one headed by Joseph DiNapoli—compelled the finding of two competing conspiracies. In the face of the claim in that case, a single conspiracy was found to exist because there were "sufficient indicia of criminal partnership." This case involved only the DiNapoli-Pugliese line of the Tramunti conspiracy.

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* Taylor characterizes his argument on this point as one of misjoinder. *United States* v. *Miley*, 513 F.2d 1191, 1207 n. 11, 1209-10 (2d Cir. 1975). The issues are, in any event, the same: (1) whether the jury was entitled to find that "each of the defendants must have been aware that he was participating in a scheme in which there were many suppliers and purchasers" of narcotics, *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), and (2) whether "prejudice resulted from the joint trial." *Schaffer* v. *United States*, 362 U.S. 511 (1960).

The evidence at trial, when viewed in the light most favorable to the Government, as it must be, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), established the single conspiracy which over a three-year period comprehended the purchasing, transporting, diluting, packaging, and redistribution of heroin and cocaine. The evidence further established that there was a "vertically integrated loose-knit combination" which included a common source, mutual dependence, and common middle-level wholesalers and distributors. *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).

In the course of the period between 1970 and 1973, the "core group" of this conspiracy including Pugliese, Pannirello, and DiGregorio trafficked in heroin with a large group of persons both in New York and Washington.* This group included Hansen, Green, Robinson and Dawson, and the latter two dealt with Taylor, Turner, and Ramsey, among others.

Each appellant moreover, purchased heroin from the "core group" or their immediate distributors. *Compare United States* v. *Tramunti*, *supra*, 513 F.2d at 1106, n. 23; *United States* v. *Magnano*, *supra*, slip op. at 5474 *and United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) *with United States* v. *Miley*, *supra*, 513 F.2d 1191, 1206 *and United States* v. *Lam Lek Chong*, *supra*, slip op. 5725, 5736-37. Taylor for instance, who was a regular customer of Robinson, purchased part of the first shipment that Pugliese and DiGregorio made to Robinson after Dawson and Robinson became partners. (Tr. 110-13,

* The "core group" changed from time to time principally because one member or another was in jail.

194, 1022). Turner purchased a kilogram of heroin from Robinson and Dawson after they had bought several kilograms from Pannirello, Pugliese's successor in interest. (Tr. 281-82). Wesley accompanied Dawson, and sometimes Robinson, to New York and New Jersey on many occasions throughout 1971 when they purchased multi-kilogram quantities of heroin from Pugliese, DiGregorio, or Pannirello. (Tr. 139-41, 157-58, 198-201, 206-07, 218-19, 234-36).* After Dawson stopped going to New Jersey, Wesley picked up heroin there from Pannirello on two or three occasions. (Tr. 243-45, 1089-93). Charles Ramsey purchased heroin from Robinson on numerous occasions throughout the period of the conspiracy, heroin which Robinson had, in turn, purchased from Pugliese, DiGregorio or Pannirello. (Tr. 190, 242-46, 909-11, 1479-80). In addition, Ramsey asked both Dawson and Ellis to introduce him to Robinson's New York 'connection' for narcotics and, on one occasion, apparently got as far as meeting DiGregorio in order to complain about the quality of the narcotics. (Tr. 190, 1479-80, 1542, 1551). Salley joined the conspiracy in June, 1971 working as a stash for Robinson. Later, of course, Salley came to New York to return narcotics to Washington. (Tr. 983). In the fall of 1972 Salley came to New Jersey alone to deal with Pannirello and Provitera. (Tr. 2534, 2534-A, 2136-37, 2534-35).**

Al Green and Basil Hansen, likewise, were major customers of Pannirello and Pugliese throughout most of the period of the conspiracy. Pannirello delivered to both of them in early 1970 on behalf of Pugliese, then on behalf

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* On other trips in mid-1971 when Wesley did not go, Dawson invariably brought the narcotics to Wesley's apartment in Landover, Maryland for sorting and cutting, (Tr. 180, 187, 201, 295).

** Salley was unique among appellants in that all five accomplice witnesses testified against him and in that he has now been convicted by two juries.

of himself and Dilacio through the end of 1972, when Provitera began making deliveries to 1380 University Avenue. (Tr. 1874-75, 2057-58, 2087-88, 2100, 2125-2128, 2132, 2148, 2503-08, 2511-14).

From the foregoing it is clear that "the Government's evidence successfully assimilates the model of the so-called 'chain conspiracy,' so familiar in other narcotics cases." *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). What the Court stated in *Agueci* is applicable here:

> "An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation." *Id.* at 827.*

Moreover, the integrity of conspiracy model here was not limited to a common source of supply. There was ample evidence of mutual dependence among the conspirators themselves. Turner, for instance, was supplying Robinson at the beginning of the conspiracy in 1970 but began purchasing from him by February, 1972. Ramsey, who bought kilogram quantities from Robinson, sup-

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* No appellant may claim the benefit of exception carved out in *United States* v. *Borelli*, 336 F.2d 376, 386 (2d Cir. 1964), *cert. denied*, as *Cinquegrano* v. *United States*, 379 U.S. 960 (1965) for links at the extreme end of the chain, who "may have no reason to know that others are performing a role similar to theirs." Ramsey, Turner, Green, Wesley, and Salley all dealt repeatedly and routinely in weights of at least a half-kilogram or more at minimum prices ranging from $14,000 to $19,000. (Tr. 246-47, 281-82, 2083, 2087, 2138-39, 2536-37). Sometimes the weights were much more; Turner, for instance, had five kilograms for sale. (Tr. 197). Taylor, who bought only one-eighth kilogram quantities, likewise, may not claim the benefit of this rule because he was buying heroin for resale, was a steady customer, and knew many other personnel in the conspiracy. (Tr. 113, 194, 996-98).

plied March, Robinson's lieutenant, with a small amount of heroin in early 1972. Taylor, Robinson's former steady customer, asked Dawson for heroin; Dawson turned him down but offered to intercede with Robinson on behalf of Taylor. (Tr. 257). Ellis, DiGregorio's girlfriend, tried to establish a connection for Ramsey with both Pugliese and with Buddy Drake, DiGregorio's former alternate source for narcotics. (1545-50).*

Each appellant herein engaged in heroin transactions continuously and routinely, for periods ranging from ten months, as in Wesley's case, to two years, as in Green's case. This pattern of conduct binds each participant to the presumption that he knew he was a part of a wide-ranging venture, the success of which depended on the performance of others whose identities he might not even have known. *United States* v. *Ortega-Alvarez*, *supra*, 506 F.2d at 457. *See United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 19[illegible]); *United States* v. *Mallah*, *supra*, 503 F.2d at 983-84; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1106; *United States* v. *Sperling*, 506 F.2d 1323, 1340-43 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *See also United States* v. *Sir Kue Chin*, 534 F.2d 1032 (2d Cir. 1976).

Appellant's reliance on *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), and *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced. *Miley* involved the question whether the value and quantity of the halucinogenic and marijuana-like drugs there sold, LSD and PCP in relatively small dollar amounts, permitted the inference, allowed in those cases above cited dealing with large amounts of narcotics worth hundreds of thousands of dollars, that different suppliers to the same group knew that others were performing the same role. *United States* v. *Miley*, *supra* at 1207. The Court there answered the question in the negative, finding that there was insufficient evidence that the core group was "conducting what could be seriously be called a 'regular business on a steady basis.'"

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* Robinson, likewise, dealt directly with Drake. (Tr. 1538).

This case is also totally unlike the facts depicted in *Bertolotti*. In *Bertolotti*, this Court found that although the indictment had charged a single conspiracy, the proof had established at least four separate, distinct and unrelated narcotics and quasi-narcotics ventures (some of which were in reality cash and narcotics rip-offs), only one of which "resembled the orthodox business operation we have found to exist in narcotics conspiracies." 529 F.2d at 155. The Court further found that the transactions "could hardly be attributed to any real organization, even 'a loose-knit one,'" and that there was no evidence which revealed "what could seriously be called 'a regular business on a steady basis.'" *Id.* It concluded that reversal was required because of the risk that the appellants therein had been prejudiced by the spillover of proof of those conspiracies with which they had had no connection.* *Bertolotti* has been limited to its peculiar facts on at least three occasions by this Court. *United States* v. *Leong*, 536 F.2d 993, 995 (2d Cir. 1976) slip op. 4347, 4351-52; *United States* v. *Lam Lek Chong*, *supra*, slip op. 5725, 5739; *United States* v. *Hinton*, *supra*, slip op. 5679, 5702.

Here, as previously noted, the proof established that all suppliers and purchasers were aware of the larger scope of the narcotics activities of the core group and their immediate distributors, and knowingly and intentionally joined these activities for profit. Further, unlike the situations in *Miley* and *Bertolotti*, the core group here purchased and sold on a continuous basis substantial amounts of heroin. To suggest that their activities, and those of appellants, did not amount to a "regular business" ignores the record of their actions. Just as in

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* Even assuming that proof of more than one conspiracy was admitted below—a proposition which the Government vigorously disputes—, there could have been no prejudice to the defendants as in *Bertolotti* and certainly no showing, as there must be to require reversal, that the evidence of more than one conspiracy affected the substantial rights of the accused. Rule 52(a) F.R. Crim. P.; *United States* v. *Lam Lek Chong*, *supra*, slip op. 5725, 5738-39.

United States v. *Hinton*, *supra*, the "consistency of personnel, method and type of operation" throughout the four years charged in the conspiracy "militates against a finding of discrete conspiracies and facilitates ready distinction of this case from *United States* v. *Bertolotti*." *Id.*

B. The charge

Wesley challenges the charge of the Court on multiple conspiracies as being inadequate. (Wesley Br. 19). The charge given is the same charge, word for word, with a partial reprise, of that approved in *United States* v. *Tramunti*, *supra*, as "clear, correct and within the decided cases." * 513 F.2d 1087, 1107.

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* The charge on multiple conspiracies is set forth below:

"There is one more thing I must say before we leave the law of conspiracy.

Some of the defendants have inferentially and expressly contended that the Government's proof fails to show the existence of the one overall conspiracy which the indictment charges. They argue that no conspiracy existed or if, in fact, one did exist, then at best the evidence shows several separate and independent conspiracies involving various groups.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charegs.

Let me repeat that.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the conspiracy charged existed between two or more conspirators. If you find that no such conspiracy existed, you must acquit. However, if you are satisfied that such a conspiracy existed, then you must determine who were members of that conspiracy.

If you find that a particular defendant was a member of another conspiracy, not the one charged in this indictment, then you must acquit that defendant.

In other words, to find a defendant guilty, you must find that he was a member of the conspiracy charged in the indictment, not of something else." (Tr. 4170-71).

The Court carefully and repeatedly instructed the jury that if they did find the single conspiracy charged in the indictment they were required to determine membership on an individual basis:

> "Let me impress upon you once more: If you decide that the conspiracy charged in the indictment existed between any of the defendants, then you must decide as to each defendant individually whether he or she joined the conspiracy with knowledge of its purpose.
>
> In determining whether any defendant was a party, each is entitled to individual consideration of the proof respecting him or her, including any evidence, knowledge, lack of knowledge, status, participation, and so on." (Tr. 4172).

Wesley argues that the Court told the jury that he could be convicted if they found multiple conspiracies. (Wesley Br. 20). However, it is apparent, taking the charge as a whole, that Judge Duffy specifically told the jury that it must acquit unless it found the existence of the single conspiracy charged in the indictment and the defendant's membership in that conspiracy. The delivery of such an instruction was specifically approved in *United States* v. *Tramunti*, *supra* at 1107, and was entirely correct. Moreover, Wesley made no objection to the charge as given. (Tr. 4188-92). Accordingly, absent plain error, the point was waived for review on appeal. *United States* v. *Hendrix*, Dkt. No. 76-1083 (2d Cir. Oct. 6, 1976), slip op. 5809, 5817; *United States* v. *Dozier*, 522 F.2d [illegible], 228 (2d Cir. 1975), *cert. denied*, 423 U.S. 1021 (197[illegible]).

Wesley also argues that his request to charge on multiple conspiracies was not granted. However, Wesley's proposed charge not only erroneously stated the law on multiple conspiracies but also sought to remove the issue

from the jury.* *Cf. United States* v. *Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (1976). Having submitted an argumentative and incorrect request the trial court's refusal to give it may not now be assigned as error. *United States* v. *Lam Lek Chong*, *supra*, slip op. 5725, 5741-42. *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976).

C. Misjoinder

Taylor claims that his joinder in the indictment below was improper. Because Taylor was named only in the conspiracy count, joinder was obviously proper at the time Taylor made his initial motion. (S. 74). *United States* v. *Miley*, *supra*, 513 F.2d 1191, 1209. Accordingly, this Court need only decide whether the trial court abused its discretion in denying Taylor's severance motion made pursuant to Rule 14, F. R. Crim. P. *United States* v. *Miley*, *supra*. In view of the evidence establishing the existence of a single conspiracy, the refusal of the trial court to grant a severance to Taylor and the other defendants was proper. *United States* v. *Bynum*, *supra*, 485 F.2d at 497.

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* Wesley's request to charge was as follows:

> In order to sustain a verdict of guilty as to Count One, the Government must introduce evidence that there was a single conspiracy as charged in that count. Count One charges all defendants with the same conspiracy deal in unlawful narcotics.
>
> The defendant Wesley contends that, if you believe the Government witnesses and accept the Government's theory of the facts, at least two (*sic*) conspiracies have in fact been proved. The first is a conspiracy among Paul Gregario (*sic*), Dawson and Robinson to deal in narcotics. A second conspiracy is one among Ellis and others to deal in cocaine. A third conspiracy involves Basil Hansen and and Hattie Ware; a fourth conspiracy defendant Smith and others.
>
> If you find that there were in fact multiple conspiracies as above outlined, rather than the single conspiracy charged, then you must acquit the defendant Wesley and all other defendants on Count (*sic*) Cne.

"Trial judges possess broad discretion in granting motions to sever pursuant to Fed. R. Crim. P. 14." *United States* v. *Cassino*, 467 F.2d 610, 622 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). The established rule in this Circuit is that a defendant

> " 'must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and that a trial court's refusal to grant a severance will rarely be disturbed on review.' " *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). *United States* v. *Miley*, *supra*.

None of the examples of alleged prejudice * cited by Taylor demonstrate that the trial court abused its discretion in denying Taylor's request for a separate trial.**

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* The claims of prejudice and the case which clearly dispose of these claims include (1) length of the trial, the volume of evidence, and the number of defendants (*see United States* v. *Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 868 (1959); *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960)); (2) limited involvement in the conspiracy (see *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied*, 410 U.S. 982 (1973); *United States* v. *Bynum*, *supra*, 485 F.2d at 497); (3) proof of the other crimes during the course of the conspiracy (*United States* v. *Bynum*, *Id.*); (4) conflicting or antagonistic defenses among the defendants (*United States* v. *Hurt*, 476 F.2d 1164 (D.C. Cir. 1973)).

** Taylor incorrectly states in his brief that prejudicial spill-over occurred when the Government sought to introduce crimes of violence. (Taylor Br. 30). The severance motions were all made in response to the Government's offer, and the receipt into evidence, of heroin and heroin paraphernalia seized from the apartment of Basil Hansen on October 4, 1973 at which time Hansen fled from his apartment by jumping out of a second floor window. (Tr. 2748-49, 2758-66, GX 66, 66A, 72-78).

POINT III

The Court properly denied Taylor's severance motion.

Taylor also argues that the trial court improperly denied his severance motion on the ground that if granted a severance he could obtain exculpatory testimony from his co-defendant Robinson. (Taylor Br. 10-13). This argument is without merit since Taylor's motion was untimely and he failed to make a sufficient showing that credible, exculpatory testimony would be forthcoming.

It is settled that the grant or denial of a motion for severance pursuant to Rule 14, F.R.Crim.P. is within the sound discretion of the trial judge. *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Mazzochi*, 424 F.2d 49, 52 (2d Cir. 1970). Denial of a motion for severance will be reversed only upon a clear showing that there has been an abuse of that discretion. *United States* v. *Turcotte*, 515 F.2d 145, 150 (2d Cir. 1975); *United States* v. *Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States* v. *Miley*, *supra*. An abuse of discretion may be found only if the joint trial was "manifestly prejudicial," *United States* v. *Berlin*, 472 F.2d 13, 15 (9th Cir. 1973) or if the trial resulted in "substantial prejudice" to a defendant's fundamental right to a fair trial, *United States* v. *Morgan*, 394 F.2d 973, 978 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968). This Court has earmarked the following criteria as some of the indicia of possible prejudice where a co-defendant is sought to be called as a witness: (a) the sufficiency of the showing that the co-defendant would testify at a severed trial *and waive* his Fifth Amendment privilege (b) the degree to which the exculpatory testimony would be cumulative, and (c) the likelihood that the testimony would be subject to substantial, damaging impeachment. *United States* v. *Finkel-*

stein, 526 F.2d 517, 523-24 (2d Cir. 1975), *cert. denied*, — U.S.L.W. — (1976). *Finkelstein* further noted that the reviewing court should also consider economy of judicial administration before determining whether the trial court abused its discretion in denying a severance. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 524.

Taylor's motion for a severance was untimely. He made no motion to sever prior to trial.* After the opening statements, Taylor first moved for severance. In moving for the severance at that time, he made absolutely no showing that Robinson's testimony would be forthcoming at a severed trial. Nor, at this first motion for severance, did Taylor's counsel make a sufficient showing that Robinson's testimony would be exculpatory. Counsel merely made representations concerning a conversation he had with Robinson outside the courtroom. (Tr. 3082-83). Those informal conversations with Robinson hardly constituted the equivalent of sworn statements by Robinson that he would exculpate Taylor.** Accordingly, the trial court properly denied Taylor's first motion on the ground that he had not made a showing sufficient to warrant a severance. *United States* v. *Crisona*, 271 F. Supp. 150, 154 (S.D.N.Y. 1967).

Only after the trial had consumed six and one-half weeks did Taylor attempt to make any showing that Robinson's testimony would be forthcoming and exculpatory. (Tr. 3126-31; Tr. 3180; Tr. 3510-32). This showing, however, was not only untimely but also insufficient.

Even upon this untimely motion, the district court attempted to determine whether Robinson's testimony

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* Motions by all counsel were made for severance during jury selection on grounds of defenses inconsistent with that proffered by Robinson. See *infra* at 77. (S. 211). That issue became moot when Robinson was severed.

** By contrast, Ernestine Barber, as to whom the jury did not reach a unanimous verdict, submitted, prior to trial, an affidavit from Robinson stating that he would exculpate her.

would be forthcoming, whether it would be exculpatory, and whether it would be credible. Initially, the court conducted three conferences with no evidence taken. At the first conference, Mr. Fisher represented that Robinson would assert his Fifth Amendment right to remain silent, but if no such right existed Robinson's testimony "would be totally exculpatory vis-a-vis [Barber and Taylor]." (Tr. 3095). Robinson was present at the second conference. There Mr. Fisher represented in Robinson's presence that Robinson "would assert before a jury his Fifth Amendment right if called to testify before a jury." (Tr. 3126). Mr. Fisher added that Robinson, however, would testify if directed by the court and would say that Taylor "didn't do it directly. He didn't do it indirectly." (Tr. 3131). Later, however, at the third conference, with Robinson not present, Mr. Fisher then modified his representation concerning any testimony of Robinson about Taylor to the effect that Taylor did not directly or indirectly buy narcotics from Robinson during "*the period of the conspiracy charged in this case.*" (Tr. 3180). (Emphasis added).

Subsequently, the court held a hearing outside the presence of the jury. At that hearing, Robinson testified that the representations of his attorney were true. he, Robinson, never dealt with Taylor during the period of the conspiracy. (Tr. 3517-18).

Even after this belated showing was made, the denial of severance was warranted on the ground that Taylor had failed to make an adequate showing that Robinson's testimony would be forthcoming. Robinson, both through his counsel and personally, repeatedly asserted that he would not answer any questions before the jury until instructed by the court that his Fifth Amendment right no longer pertained. (Tr. 3096-97; 3126; 3128; 3530-32). Specifically, Robinson stated he intended to assert the Fifth Amendment privilege with respect to any of the

matters relating to Indictment 75 Cr. 1112 as long as he was allowed to do so. (Tr. 3530). Robinson also testified that he had no knowledge of any possible disposition of his case by plea, (Tr. 3530-31), nor did he intend to waive his appellate rights. (Tr. 3531). Since it appears that Robinson would not deny that he did have narcotics dealings with Taylor at least after the period charged in Indictment 75 Cr. 1112, (Tr. 3180; 3517-18), Robinson would have asserted his Fifth Amendment right as to those transactions, whether or not the Government sought to prove them against Taylor as similar acts. Simply put, Taylor did not satisfy the factor articulated in *United States* v. *Finkelstein*, *supra*, as to "the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege."

It is noteworthy that in attempting to resolve Taylor's severance claim, and to accommodate the competing interests of Robinson, the Government offered to permit Robinson to testify at trial with limited "use immunity" —but not derivative use immunity. The Government believed that in this way Robinson could testify at the trial for Taylor without fear that his words would be used against him at a subsequent trial. (Tr. 3136). That offer was unacceptable to Robinson. (Tr. 3127). The Government submits that this refusal by Robinson is further evidence that Robinson's testimony would not be forthcoming even at a later trial of Taylor.

Furthermore, as to whether the exculpatory testimony would be subject to substantial, damaging impeachment, this Court can infer from the denial of the severance motion that the trial court, having had an opportunity to view the demeanor of the witnesses, believed that a reasonable juror would not have credited Robinson's testimony to the extent it purported to exculpate Taylor. As set forth in the Statement of Facts, *supra*, the Government had elicited clear proof of Taylor's involvement in

the conspiracy, including direct purchases of heroin from Robinson (Tr. 110; 1002-04, 1020), payments to Robinson and Dawson for heroin (Tr. 112-14), and payments to March for heroin. (Tr. 1020). The evidence established that Taylor was one of Robinson's regular customers. (Tr. 192-94; 257). Robinson's testimony therefore was incredible on its face. Moreover, the court was already aware that Robinson had been convicted twice for narcotics felonies, one in *United States* v. *Tramunti* of the conspiracy charged in this indictment, and once thereafter in the Eastern District of Virginia for narcotics dealings undertaken while on bail pending the resolution of the *Tramunti* appeal.

Finally, considerations of judicial economy strongly supported the district court's denial of the severance in this case. The trial consumed nine weeks. At the time Taylor's severance motion was made the court fully expected to try the Government's case against Robinson immediately following this trial.* (S. 282). If the court had granted Taylor's motion for severance, it appeared probable that there would be no less than three lengthy trials in order to adjudicate a single narcotics conspiracy. (Tr. 3142-43). In fact, however, the third trial as to Taylor would have had to await the long period of appellate review which Robinson testified he would pursue if convicted. Particularly in view of these considerations of judicial economy, the trial court properly exercised its discretion in denying the severance.

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* In fact, Robinson remains untried on Indictment 75 Cr. 1112.

POINT IV

The District Court properly denied Taylor's motion to reopen his case.

Taylor complains that he should have been permitted to reopen his case to recall Mrs. Evelyn Goldring to testify about Taylor's residence during September, 1972. Mrs. Goldring had originally been called by Taylor to establish that Taylor, who lived with Mrs. Goldring's tenant, Breda Hines, resided in a basement or first floor apartment and not, as the witness James March had testified on direct examination, in a top floor apartment. March had testified he and Robinson had delivered narcotics to Taylor in that top floor apartment. (Tr. 1019-20, 3325-3333).

Taylor's attempt to impeach March's credibility on this point became complicated by the fact that there was a discrepancy between the typed transcript of March's testimony, which placed the delivery in September of 1971, and the reporter's notes of March's testimony, which reflected that the delivery was made in September, 1972. (Tr. 1018, 4206). This discrepancy was noted by the time March testified on redirect examination when he stated, without confusion in the record, that the delivery to Taylor took place in September, 1972. (Tr. 1252-53).

When Mrs. Goldring was called by Taylor she testified that Taylor's girlfriend (and, therefore, presumably Taylor) lived at 3348 Mt. Pleasant Street in September, 1971. (Tr. 3322, DX B). On cross-examination Mrs. Goldring testified that in September 1972 Taylor had already moved from the basement apartment at 3348 Mt. Pleasant Street and was residing at 3342 Mt. Pleasant Street. (Tr. 3343; GX 85). It is absolutely clear, therefore, that contrary to Taylor's suggestion to

this Court, (Taylor Br. 15), the witness Goldring had already testified as to where Taylor was living in September, 1972, and it would have served no purpose to recall her.

The Court properly instructed the jury on two separate occasions the jury that its recollection governed. (Tr. 4131, 4213-14). The jury was further instructed that counsel's recollection differed on this point and that there was a discrepancy between the reporter's notes and the transcript. (Tr. 4213-14). This instruction was more than that to which Taylor was entitled since the reporter's notes were the "original recording" and, thus, the best evidence. Rule 1002, F.R.Ev.*

POINT V

Taylor's counsel had adequate time to prepare for trial.

Taylor claims that the district court erred in granting only a two day continuance for his counsel to prepare for trial. It is settled law that the granting or denial of a continuance is within the sound discretion of the trial court. *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). Where a defendant complains that the denial of continuance was error, the reviewing court must examine all the facts and circumstances of the case. *Stidham* v. *Wing*, 482 F.2d 817, 820 (6th Cir. 1973). In this case Judge Duffy's denial of a continuance was more than justified.

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* Taylor's claim that the jury's first inquiry after deliberations commenced reflected concern with this discrepency is disingenuous. (Taylor Br. 16). The jury asked *for all* of the testimony relating to Taylor and was in all likelihood proceeding with Taylor first because he was the first-named defendant. (Tr. 4198).

First, an examination of the record establishes that counsel had more than adequate time to prepare. Defense for Taylor, John Ciampa, Esq., was assigned to this case on Tuesday January 20, 1976, following Taylor's arrest on January 18, 1976 in Washington, D.C. but prior to his removal to New York. (Tr. 1/26/76 at 11). On Wednesday January 21, 1976 the Government agreed to meet with Mr. Ciampa for purposes of discussing its case in general against Taylor. The 3500 material for the Government's first witness Thomas "Tennesee" Dawson was made available to Mr. Ciampa on Friday, January 23rd. On Monday January 26, 1976 counsel requested a one-week adjournment of the case. The Court agreed to a 48-hour adjournment. (Tr. 1/26/76, 12). The jury selection process began on Thursday, January 29 and continued through Wednesday, February 4, 1976. Opening statements were made on Wednesday, February 4, 1976. Direct examination of the Government's first witness occurred on February 4th, 5th and 9th. The court was in recess on Friday, February 6th and on the weekend of the 7th and 8th. Mr. Ciampa began his cross-examination of the first witness on February 9th and continued into February 10th.

Thus, counsel had at least nine days to prepare for trial prior to the commencement of jury selection and more than two weeks before the jury was sworn. Cross-examination of the Government's first witness was not begun until February 9th, nearly three weeks after counsel was appointed in the case. Mr. Ciampa was not called upon to present a defense until March 16th, seven weeks after the trial had commenced.

However, even apart from the fact Taylor's counsel had sufficient time to prepare, the district court was justified in denying the continuance based on Taylor's own responsibility for any time problems encountered by his lawyer. At the outset of this case, on August 11,

1975, Taylor was arraigned at which time he was referred to a magistrate for appointment of counsel. Jay Goldberg, Esq., was appointed at Taylor's request. Mr. Goldberg, however, did not file a notice of appearance. On November 12, 1975 the United States Attorney's office sent Mr. Taylor a letter to his last known address notifying him that a pre-trial conference had been scheduled for November 21, 1975. That letter was returned marked: "No such address." At the pre-trial conference, defendants were instructed to appear at 10:00 A.M. January 21, 1976 for commencement of trial. (Tr. 11/21/76 at 16). Nonetheless, the record indicates that Taylor did have actual knowledge of the trial date when he was arrested by the agents. (Tr. 1/26/76, 18).* Indeed, the court itself found that "the defendant intentionally wished to delay the start of this trial and delay it by not being present." (*Id.*, 19-20). At the very least, however, Taylor had actual knowledge that an indictment had been filed charging him with narcotics violations and he failed to apprise the court of his whereabouts—factors which this Court has held to be pertinent to the issue of continuance. *United States* v. *Rosenthal*, *supra*, 470 F.2d at 884.

It is particularly noteworthy that to date, counsel recites no actual prejudice that resulted from the district court's refusal to grant a longer continuance. To support his claim Taylor merely provides transcript references where he was able to offer proof contradictory to the Government's case. He does not claim that he was unable to locate a particular witness, to take a specific photograph or to conduct other investigation leaving this Court to imagine what he could have found.** The Gov-

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* A bench warrant issued for Taylor's arrest on December 2, 1975.

** At the time Mr. Ciampa requested one week, the Government specifically called upon him to make "a showing that he intends to call alibi witnesses or some such thing." (Tr. 1/26/76, 12-13). No such showing was made then, nor has any been made now.

ernment submits that the law requires counsel to make some showing of actual prejudice before denial of a continuance can be found to be an abuse of discretion. *United States* v. *Maxey*, 498 F.2 474 (2d Cir. 1974). Mere speculation is not enough. *United States* v. *Johnson*, 495 F.2d 335 (3d Cir. 1974).

Given defendant's failure to make a showing of prejudicial, as well as the adequate time allowed for trial preparation, the denial of continuance beyond the nine days from appointment to jury selection was clearly not an abuse of discretion. *United States* v. *Hall*, 448 F.2d 114 (2d Cir. 1971), *cert. denied*, 405 U.S. 935 (1972); *Avery* v. *Alabama*, 308 U.S. 444 (1940); *United States* v. *Davis*, 436 F.2d 679 (10th Cir. 1971).

POINT VI

The trial court did not abuse its discretion in requiring Taylor and Ramsey to rest.

Taylor and Ramsey assert that their convictions should be reversed because the district court required them to rest their cases without allowing them to call witnesses. This argument is without foundation.

A. Al Taylor

On February 3, 1976 the subject of Cornelius Garner was raised for the first time by counsel for Taylor.* The exchange of counsel and the court at that time made it clear that Garner would be produced upon timely notice from defense counsel, but that the Government could not

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* Garner was identified at trial by Dawson as a narcotics buy[illegible] he dealt with during 1971. (Tr. 191-92, 332-33).

keep people at the Metropolitan Corrections Center (MCC) indefinitely.*

This matter was next raised five weeks later on March 10, 1976 when Mr. Ciampa stated that he wanted to have Garner produced, although he did not state that he intended to call him as a witness.** The Government stated that Garner was believed to be in the Federal Reformatory in Petersburg, Virginia. (Tr. 2624-25). On March 12, 1976, having determined that Garner was not in Petersburg, but rather in the federal prison in Lorton,

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* The exchange of counsel was as follows:

"Mr. Ciampa: Your Honor, while the jury is out, may I approach with a totally different application? It has to do with some witnesses that may be necessary. I want a representation from the government they will be available.

The Court: Do you want to tell me privately?

Mr. Ciampa: No. It may be necessary for me to call one Cornelius Garner also known as Moochie. I understand he is in the government's custody today at MCC.

The Court: Don't worry about it. If you want to call him MCC (*sic.*), I will make sure he is here.

Mr. Ciampa: I don't think that is his permanent address. He was brought in from somewhere else and I wanted to make sure he is available for trial.

Mr. Engel: He was brought in on a writ and the writ has been satisfied. I don't know whether he is still there or what the situation is.

In any event——

The Court: I bet you money we can get him in here again.

Mr. Engel: When it comes time, we can get another writ up and get him back but we have to take the position we cannot keep everybody over at MCC." (S. 214-15).

** Taylor's counsel's representations that a request was made "on January 29th and on February 4th and several times thereafter" are unsupported by the record. (Tr. 3543-44).

Virginia, the Government prepared a writ of habeas corpus ad testificandum. The writ issued forthwith to have Garner produced.*

On Tuesday, March 16, 1976, Garner still had not appeared. (Tr. 3118).** On Wednesday, March 17th, the Government informed the court that the United States Marshal was arranging for Kelly and Garner to be flown up from Atlanta and Washington. (Tr. 3279-80). Two days later, March 19, 1976, counsel for Taylor again inquired about Garner's whereabouts. The Government set forth its record of cooperation with the defense in the production of witnesses in the case, and counsel for Taylor specifically agreed that the Government had been

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* On the same day, upon like application by defense counsel, writs were prepared by the Government and issued to secure the presence of James Kelly and Drayton Curry, both of whom were in federal custody. (Tr. 2628; 3468-70). [Statements on page 2628 of the trial transcript attributed to the Court by the reporter and by Taylor (Taylor Br. 19) were in fact made by Government counsel]. Kelly and Curry were thereafter produced, interviewed by counsel for Ramsey and Wesley respectively. Judge Duffy granted counsel for Wesley a short continuance to speak with Curry. Counsel for Ramsey also spoke to Kelly. Neither Kelly nor Curry was called. (Tr. 3468, 3483-84). Paul DiGregorio was likewise produced on a writ, and was likewise never called. (Tr. 3280, 3298, 3483).

** On March 16, 1976, the defense was due to open its case, and not one of twelve defendants had a single witness ready to testify. (Tr. 3120). The jury was excused, and the court told them that the reason they were excused was because it was Purim, a Jewish holiday. (Tr. 3123). On March 17, only two witnesses were called by defendants, one by Miller and one by Fergus[illegible] No one else was prepared to go forward. (Tr. 3194, 3231, [illegible]). The court, nevertheless, instructed the jury that "things moved a little bit faster than we expected them to" in order to explain to the jury why they were being excused early. (Tr. 3290).

"more than cooperative." * Judge Duffy informed defense counsel that if no witnesses appeared by Monday, March 22nd, the defense would be required to rest. (Tr. 3429). Counsel for Taylor later said he was not "suggesting that Mr. Engel has been uncooperative" in alerting the Court that he would move for a continuance on Monday, March 22nd in the event that Garner was not

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* The colloquy was as follows:

"Mr. Ciampa: May I be heard, Your Honor?

As to Cornelius Garner, I would like to say that I asked for that witness weeks and weeks ago, and he is in Government custody.

The Court: If he's around the corner, see him this afternoon.

Mr. Ciampa: I believe he's not here. I don't believe he's in New York.

Is that correct?

Mr. Engel: I don't know, Mr. Ciampa.

I would like to lay a record here about what the Government has done. The Government has done everything it has been asked to do by the defense in this case. It has issued subpoenas for defense witnesses, it has made efforts to call defense witnesses who have been under subpoena, it has issued writs for defense witnesses at the time that the requests were made.

Mr. Ciampa made a request, and I asked him to renew it at the time he thought he would call him. This was early in the trial. He renewed it a week ago Thursday morning, and I got the writ up on Friday afternoon for your Honor's signature, if you recall.

The Court: That is the writ without the affidavit.

Mr. Engel: I did the writ without the affidavit.

I think, your Honor, that as a matter of procedure here, the defendants can issue subpoenas. I want to say I don't think there is a defense lawyer here who can say that I have not made efforts to accommodate their needs where the Government would arguably have more easy access to witnesses, one way or the other.

Mr. Ciampa: That's true. I would like to say that's true. That is not an issue. Mr. Engel has been more than cooperative." (Tr. 3427-28).

produced. (Tr. 3462). Government counsel called Taylor's counsel late Friday to inform him that Garner still had not arrived. (Tr. 3469).

On Monday, March 22nd, Garner had not yet arrived. Counsel for Taylor, however, made no motion at that time. The same day the Court had occasion to observe:

> "I have done my best to run a completely fair trial. I have ordered the Government to do more than normally is done. They have cooperated as far as I can find out to the best of their ability. There is nothing more I can do." (Tr. 3480).

The defense rested on March 22, 1976. (Tr. 3485).* Counsel for Taylor moved for leave to reopen his case and for a continuance because of what he termed a court order to the Government to produce Garner, and the Government's failure to produce him. These motions were not granted.

To properly evaluate Judge Duffy's decision to deny any further continuance, it is necessary to consider Garner's role in this case. The only mention of Garner during the trial occurred in Dawson's testimony. Dawson identified Garner as one of his own customers. (Tr. 191-92). That was the sum total of Garner's involvement in

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* On the following day, March 23rd, however, a witness for the defendant Miller, Minota Claggett, finally appeared pursuant to subpoena, and the defendant was allowed to reopen her case to have Claggett testify. (Tr. 3589). On March 22nd the Court had denied a request for a continuance on the part of Miller. On that occasion, the Court observed, "We can go go (*sic*) on with continuances forever and ever and we have to finisn at some point. You have rested whether you like it or not." (Tr. 3479). Obviously, the Court's comment to this effect was directed to the defendant Miller, not to Taylor, as he suggests in his brief. (Taylor Br. 20).

this conspiracy. There was no suggestion that Taylor ever dealt with Garner.*

Thus, it is not surprising that counsel for Taylor was unable at trial and remains unable now to specify the exculpatory evidence that Garner would have provided if he had been called to testify and if he had waived his Fifth Amendment privilege. After trial, defense counsel never submitted—or to the Government's knowledge, attempted to obtain—an affidavit from Garner setting forth any exculpatory evidence which he would offer.

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* The insignificance of Garner is borne out by defense counsel's disinterest in him during the cross-examination of Dawson. In cross-examining Dawson, Taylor's counsel only inquired about Garner once. That inquiry was whether Dawson had received a telephone call from Garner at a New York hotel during the week prior to trial. Dawson denied receiving such a call. (Tr. 318). The relevance of this evidence was dubious in the first place and any attempt to contradict Dawson on this point would have been collateral.

It is clear, moreover, that the granting of a writ of habeas corpus ad testificandum lies in the sound discretion of a trial court. *United States* v. *Lupino*, 480 F.2d 720, 726 (8th Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States* v. *Goldenstein*, 456 F.2d 1006, 1012 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974); *United States* v. *Rigdon*, 459 F.2d 379, 380 (6th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973). Denial of a writ of habeas corpus ad testificandum is proper where the testimony would be collateral, *United States* v. *Norman*, 402 F.2d 73, 77 (9th Cir. 1968), *cert. denied*, 397 U.S. 938 (1970), or cumulative, *McDonnell* v. *United States*, 457 F.2d 1049, 1051 (8th Cir.), *cert. denied*, 409 U.S. 860 (1972), or where the allegations of the necessity of the witness do not constitute a "substantial showing" that the witness would be necessary to present an adequate defense, *United States* v. *Conder*, 423 F.2d 904, 909 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). *Cf.* 28 U.S.C. § 2241 (c) (5). Denial of a continuance is likewise proper in these circumstances. *Brady* v. *United States*, 433 F.2d 924, 925 (10th Cir. 1970).

There was never any showing of what Garner's testimony would be. It was, therefore, proper to deny the continuance.

In making post-trial motions, defense counsel did not press this claim or present any information which would support an assertion that Garner would even testify were a new trial granted.

Considering Taylor's failure to make any showing on this issue and considering the improbability that such a showing could be made, the trial judge here did not exclude evidence of probative value from a witness "ready, willing and able to testify." *Cf. United States* v. *Dwyer*, Dkt. No. 76-1108 (2d Cir. July 26, 1976), slip op. 5091, 5096-97. There was no showing that Garner could, or would, testify about anything at all, much less about material matter. Even assuming that Garner had relevant evidence, however, the court acted properly in excluding it because of the "undue delay" to the proceedings which a continuance would necessitate. Rule 403, F.R.Ev. Accordingly, there was no error in requiring Taylor to rest.

B. Charles Ramsey

Ramsey contends that the trial court erred in forcing him to rest his case without the benefit of testimony of Christine Green, a 19-year-old cousin of the Government witness Dorothea Ann Ellis.*

The relevant facts are that on March 18, 1976, a Thursday, counsel for Ramsey attempted to ascertain the whereabouts of Christine Green by asking Government

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* Ellis testified on February 25, 1976 that in the summer of 1973 she, Ramsey, James Kelly, her daughter Stacey, and her cousin "Chris" drove to New York. When they arrived, she testified that Ramsey and Kelly and she went to see Buddy Drake and a man named "Gus" to discuss purchasing narcotics. (Tr. 1544-49). In cross-examining Ellis, counsel for Ramsey asked Ellis about her cousin Chris, inquiring whether Chris was a woman and then her age; counsel never asked her last name or her address. These items were not volunteered. (Tr. 1688-89).

counsel for information which the Government might have.

On Friday night and again on Saturday morning Government counsel informed counsel for Ramsey, as he informed the court the following Monday morning, that he had reached Christine Green's mother on the telephone and informed her that her daughter was needed as a witness in federal court and should appear in the United States Attorney's office at 9:45 Monday morning. Government counsel further stated that Miss Green's mother said her daughter would appear voluntarily after Government counsel told her that he could not force her daughter to appear unless she were subpoenaed. (Tr. 3471-72, 3484-85).* On Monday morning, counsel for Ramsey made an oblique request, as did Ramsey himself, for more time to hire an investigator so that Miss Green could be located and served with a subpoena. (Tr. 3485).**

Ramsey, for the first time on appeal, likens the Government's conduct in helping him locate Miss Green to the willful suppression of evidence favorable to the defendant in violation of the requirements of *Brady* v. *Maryland*,

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* Ellis was at this time in federal protective custody. She had been relocated and given a new identity as a result of threats to her life and family. For the same reasons her family's phone was delisted. (Tr. 1444, 3429). Ramsey's assertion that the Government refused to disclose the address of a witness (Ramsey Br. 9, 22) suggests that the Government refused to make Miss Green's address available. The address the Government refused to disclose was Miss Ellis', not Miss Green's. The Government supplied Miss Green's address when it was requested by counsel for Ramsey. (Tr. 3538).

** Counsel for Ramsey admitted knowing of the existence of the woman named Christine for approximately three weeks before inquiring about her last name or whereabouts. (Tr. 3472). He attempted to excuse his failure to act diligently by stating that he was waiting to talk first to Kelly, another witness to the event (Tr. 3558). This explanation did not make sense and provides no valid reason for counsel's failure to act earlier.

373 U.S. 83 (1963). This contention is frivolous. An identical claim on similar facts was made and rejected in *United States* v. *Cole*, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972).

There is no showing that the Government attempted to suppress exculpatory evidence because there is no showing as to what Miss Green's testimony would have been, if called. Far from suppressing the testimony, the Government sought to locate and to produce Miss Green for the use of the defendant Ramsey.

The failure to discover Miss Green's identity and to request a subpoena by affidavit to the court may not be laid at the Government. There was no good excuse for defense counsel's delay in getting that information, and accordingly, the trial court need not have ordered subpoenas. *United States* v. *Jones*, 487 F.2d 676, 679 (9th Cir. 1973). The denial of a continuance, even assuming the relevance of Miss Green's testimony, was likewise proper because of the delay which the securing of her presence would require. Rule 403, F.R.Ev. Counsel could have sought his own subpoena under Rule 17(b), F.R.Cr.P., and having failed to make timely motion, he may not thereafter be heard to complain. *Ray* v. *United States*, 367 F.2d 258, 264 (8th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967).

POINT VII

Taylor's motion for change of venue was properly denied.

Taylor's untimely motion for a change of venue, pursuant to Rule 21(b), F.R.Crim.P., was properly denied.

Prior to trial defendants Smith and Ramsey moved to transfer venue to Washington, D.C. On January 14,

1976, the Court denied that motion.* The trial began on January 29, 1976. On February 11th, after the trial had entered its fourth week, Taylor moved to transfer. (Tr. 1070). The trial court properly denied the motion as untimely. (Tr. 1072).

Taylor's claims that the denial of his belated motion deprived him of due process of law. (Taylor Br. 24). To support this assertion, Taylor alleges that he was prejudiced by an inability to call witnesses who resided in the District of Columbia. However, he had access to nationwide process. Moreover, he made no showing that any specific witness was unavailable to him merely because the trial was in New York. As to Taylor's inability to recall Ms. Goldring, there was no prejudice because she had testified on cross-examination about the very issue for which she was to be recalled. (See discussion of Point IV, *supra*). Taylor's further claims of prejudice are similarly without foundation. The inability of Washington counsel to represent him in the New York trial does not amount to prejudice where, as

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* In denying Smith's motion, the court wrote:

> "Defendant moves in the alternative under Rule 21(b), Fed.R.Crim.Pro. to transfer venue to the District of Columbia on the ground that the convenience of the parties and witnesses will be better served. There is no suggestion that the venue is improper, 18 U.S.C. § 3236. Rather, the defendant appeals to the discretion of this Court. United States v. United States Steel Corp., 233 F. Supp. 154, 156 n. 3 (S.D.N.Y. 1964).
>
> The conspiracy count charges overt acts which took place at least partially in the three states and the District of Columbia. It is this Court's view that the interests of justice and judicial economy would be enhanced by trying all defendants in the same district. A severance at this point would serve only to aggravate the delay of which Smith already complains." (Opinion dated Jan. 14, 1976).

Ramsey's motion was denied by endorsement on January 5, 1976. Ramsey does not raise this issue on appeal.

here, there is no claim that New York counsel was incompetent. Finally, Taylor had no right—as he seems to suggest that he did—to have a jury with pre-existing familiarity with the geography of Washington, D.C. To the extent that the geography of Washington, D.C. was relevant counsel could have offered evidence on this issue, as did counsel for the defendant Smith who offered into evidence a map of the District of Columbia, which was received without objection from the Government. (Tr. 3498).

These insubstantial claims of prejudice hardly support a motion to transfer made four weeks after the beginning of trial. The district court made a reasonable determination that the "interests of justice" did not require transfer to the District of Columbia, under Rule 21(b). Absent an abuse of discretion, the district court's ruling on a motion under Rule 21(b) must be upheld. *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240 (1964); *United States* v. *Projansky*, 465 F.2d 123, 139 (2d Cir.) 409 U.S. 1006 (1972).

POINT VIII

The court below properly denied defendants' mistrial motions based upon their claims that they had been seen in manacles by jurors.

Taylor asserts that "the jury" saw "four of the defendants in manacles on at least four occasions," (Taylor Br. 32), and Ramsey similarly argues that "[m]embers of the jury saw [Ramsey] in manacles on three separate occasions, as he was being led through the courthouse by United States Deputy Marshals." (Ramsey Br. 22). Taylor and Ramsey argue that Judge Duffy erred in denying their motons for a mistrial based on these claims. The argument is without merit.

On March 11, 1976, counsel for Ramsey, Hansen, Taylor and Turner advised the court that their clients claimed to have been seen in manacles by four jurors. This occurred, the defendants believed, when the door of an elevator carrying some jurors opened as the elevator stopped at the third floor where the defendants were standing. (Tr. 2697, 2706-07, 2714). With the court's permission and at the court's direction, Assistant United States Attorney Engel inquired of the two deputy marshals who had been escorting the defendants to determine what had occurred. (Tr. 2708-11). None of the defendants objected to proceeding in this way.

After speaking with the two deputy marshals, Mr. Engel reported that they recalled only two jurors being in the elevator, along with United States Magistrate Raby. As the marshals recounted the event, one of the marshals was in front of the entrance to the elevator, with the defendants Ramsey and Taylor to the side and slightly behind that marshal. (Tr. 2708-11). Mr. Engel further reported that, the marshals did not believe that Hansen and Turner were visible from the elevator. (Tr. 2711). Finally, Mr. Engel reported that he had interviewed Magistrate Raby who was standing in front of the jurors in the elevator. Magistrate Raby remembered seeing the marshal but nobody else. (Tr. 2711-12).

Counsel for Taylor did not seek a hearing in which the marshals and Magistrate Raby would be called, choosing instead to argue to the court that Magistrate Raby would be less likely than the jurors to notice the defendants in handcuffs. (Tr. 2713). Defendant Turner then gave his own account of the incident, stating that "we could see all the jurors very plainly", but later saying that "I wasn't in the position to see them. Ramsey and whoever the others—I think it was Taylor—was definitely right in visible view." (Tr. 2714). Counsel for the de-

fendant Ramsey asserted that jurors had seen the defendants in handcuffs on a prior occasion. (Tr. 2716). Having heard this entire presentation, Judge Duffy denied the motions for a mistrial on the grounds that the viewing of the defendants in handcuffs was not "sufficient to prejudice the jury." (Tr. 2719).

Judge Duffy's ruling is well supported by pertinent case law. A brief, inadvertent view by jurors of defendants in handcuffs is not without more so inherently prejudicial as to require a mistrial. *United States* v. *Chrzanowski*, 502 F.2d 573, 576 (3d Cir. 1974); *United States* v. *Rickus*, 351 F. Supp. 1386, 1387 (E.D. Pa. 1972), *aff'd.*, 480 F.2d 919 (3d Cir.), *cert. denied*, 414 U.S. 1006 (1973); *United States* v. *Hopkins*, 486 F.2d 360, 362-63 (9th Cir. 1973); *United States* v. *Figueroa-Espinoza*, 454 F.2d 590, 591 (9th Cir. 1972); *United States* v. *Acosta-Garcia*, 448 F.2d 395, 396 (9th Cir. 1971); *United States* v. *Hamilton*, 444 F.2d 81, 82 (5th Cir. 1971); *McCoy* v. *Wainwright*, 396 F.2d 818 (5th Cir. 1968); *United States* v. *Leach*, 429 F.2d 956, 962 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *United States* v. *Crane*, 499 F.2d 1385, 1389 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974); *Kennedy* v. *Cardwell*, 487 F.2d 101, 109 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). Thus, Judge Duffy properly denied the defendants' motions for a mistrial, particularly since the defendants made "no specific showing of how the defendants were harmed . . . ." *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). See also *Kennedy* v. *Cardwell*, *supra*, at 109.

Moreover, following denial of the mistrial motions, counsel for Taylor and Ramsey sought an instruction to the jury on this issue. (Tr. 2719-20). Judge Duffy

granted the request by including in his charge to the jury the following instruction:

> It may have appeared that certain defendants may have been in custody while others were free to come and go as they chose. The reason for this is that some defendants were able to afford bail and others were not. You are to draw absolutely no inference as to whether a defendant is able to afford bail or whether he was not. (Tr. 4143-44).

The charge given by the court was substantially the one requested by the defendants and cured any possible prejudice engendered by the incident.

After having obtained the remedy which they sought below, Taylor and Ramsey argue to this Court that Judge Duffy should have conducted a voir dire of the jury. No request was ever made to Judge Duffy on behalf of any defendant for such a voir dire. Accordingly, the defendants may not now clam that Judge Duffy committed error by failing to conduct one. See *United States* v. *Woodner*, 317 F.2d 649, 651-52 (2d Cir. 1963); *United States* v. *Larkin*, 417 F.2d 617, 619 n. (1st Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970); *United States* v. *Rickus*, *supra*; *United States* v. *Figueroa-Espinoza*, *supra*.*

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* In any event, there is no authority to suggest that a voir dire of the jury is the only proper remedy where jurors have seen a defendant in manacles. An appropriate remedial instruction, as requested by the defendants and as given by Judge Duffy in this case, has also been approved as a proper and effectual response to the problem. *United States* v. *Acosta-Garcia*, *supra*. See also *United States* v. *Figueroa-Espinoza*, *supra*; *United States* v. *Rickus*, *supra*.

The decision to seek a curative charge rather than a voir dire could well be based on counsel's considered judgment that a voir dire would exacerbate the problem by alerting otherwise uninformed jurors to the defendant's custody. The curative instruction given here cast the matter in general terms, avoiding any specific reference to handcuffs or manacles. A district judge's decision to accommodate defense counsel's preference for a curative instruction could hardly be characterized as error.

POINT IX

Turner's claim of selective prosecution is frivolous.

Turner claims that the trial judge erred in denying him a hearing on his allegations of "selective prosecution." (Turner Br. 16). This claim is frivolous.

A defendant, to support a claim of selecitve prosecution, bears the "heavy burden of establishing, at least *prima facie*," intentional and purposeful discrimination, a notion containing two elements. The elements were described in *United States* v. *Berrios*, 501 F.2d 1207 (2d Cir. 1974), as follows:

> "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
>
> (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." 501 F.2d at 1211.

No showing of either of these critical elements was made to either the trial court or to this Court.* Nothing

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* The claim of selective prosecution relates not to the guilt or innocence of Turner but rather to a constitutional infirmity in the initiation of the prosecution. As such, it must be raised by motion prior to trial pursuant to F.R.Cr. P. 12(b) which provides in pertinent part:

> (b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial

[Footnote continued on following page]

in the record below indicates that the Government was even aware of Turner's indictments in Washington, D.C. or in Florida although the Government was aware of his conviction and ten-year sentence for tax evasion in the District of Maryland. (Tr. 803, 854).* In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886) the Supreme Court held that the law may not be "applied and administered

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of the general issue may be raised before trial by motion . . .The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution.

The claim, not having been made prior to trial, must be deemed waived. *Cf. United States* v. *Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973).

Turner first raised the matter after five weeks of trial by seeking the grand jury testimony of Thomas Dawson and James March, previously marked and supplied to defense counsel as 3500 material, in order to substantiate a claim of "selective prosecution." (Tr. 2482-84). Turner repeated his request three days later at which time the Assistant United States Attorney responded that there had been no written communication between the United States Attorney's Office in the District of Columbia and that in the Southern District of New York with respect to Turner's case, except for a brief cover letter from an Assistant United States Attorney in Washington, enclosing a copy of Dawson's grand jury testimony in the District of Columbia. (Tr. 2886). This letter was later viewed by the court. (Tr. 3395). The Assistant United States Attorney also checked with another Assistant United States Attorney familiar with the case and reviewed the file in the *Tramunti* to see whether any other correspondence existed. Nothing was found. (Tr. 3305). Turner requested a copy of the cover letter and the Government did not resist this request. (Tr. 3509).

* The coincidence of Judge Gesell's dismissal of the indictment in *Lara* v. *United States*, 520 F.2d 460 (D.C. 10th Cir. 1975); with Dawson's grand jury appearance in the District of Columbia was just that and nothing more. In any event, that grand jury testimony of Dawson was not used before the grand jury in obtaining the indictment below, contrary to Turner's assertion (Turner Br. 21), and was supplied by letter of January 20, 1976 for use as 3500 material at the trial.

by public authority with an evil eye and an unequal hand." It is likewise clear that the conscious exercise of some selectivity in [law] enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448 (1962). As long as the selectivity is not based upon the unjustifiable standards of race, religion, or some arbitrary classification, no claim of denial of equal protection will lie. *Yick Wo* v. *Hopkins*, *supra*; *United States* v. *Strutten*, 494 F.2d 686, 688 (2d Cir. 1974). *Cf. United States* v. *Rickenbacker*, 309 F.2d 462, 464 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).*

Turner has shown nothing which would justify the hearing which he asserts it was error to deny.** Absent such a showing, it is "clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties." *Pugach* v. *Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961).

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* The fact that multiple prosecutions were brought against Turner may be laid not to the harassing tactics of prosecutors but to the multiplicity and geographic variety of Turner's narcotics dealings. Narcotics dealers obviously are not a "suspect class" which would require careful scrutiny of alleged unequal or discriminatory law enforcement. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, *J.* concurring).

** Turner's prosecution in the District of Columbia and the Southern District of Florida, likewise, give rise to no speedy trial claims here as it is clear that the conspiracy charged here consisted of entirely different persons and over a time period which differed significantly from that in *United States* v. *Lara*, 520 F.2d 460 (D.C. Cir. 1975). Not one of the defendants, named in *Lara*, execpt Turner, was named here as a defendant or co-conspirator. *Cf. United States* v. *Papa*, 533 F.2d 815, 820 (2d Cir. 1976). The time period of the *Lara* conspiracy, was from September 1, 1967 to April 30, 1971; the period charged below was from January 1, 1969 to December 6, 1973. *Lara* v. *United States*, *supra*, 520 F. 2d at 461.

POINT X

Turner was not denied effective assistance of counsel.

As his last point, Turner argues that he was denied effective assistance of counsel. Specifically, he contends that his trial counsel's cross-examination of Dawson was "poorly executed, clearly ineffective, and inadequate as a defense." (Turner Br. 23). He further argues that following Dawson's testimony, he should have been granted a continuance to permit substitution of private counsel.

Contrary to the highly critical description of the legal abilities of Turner's assigned trial counsel, the record reflects that he was in fact competent and experienced. The trial court noted that it was familiar with the work of Turner's lawyer and stated: "[H]e is an experienced attorney and I know he has had a lot of experience, both in Bronx County and he did one major narcotics case before me . . . ." (Tr. 852). Review of counsel's cross-examination of Dawson reveals that it was Turner's counsel who was responsible for creating one of the serious issues of credibility in the case. He accomplished that by asking Dawson to draw a diagram of Pinky Miller's apartment, where, Dawson testified, Turner had come to pick up samples of narcotics while Robinson was cutting heroin. (Tr. 370). It later developed that Dawson's diagram omitted a hallway between the living room and the bedroom, from which Dawson had testified he observed events in the living room. A floor plan revealed that the hallway, which Dawson omitted from his sketch, prevented a clear view of the living room from the bedroom. (Tr. 1356; GX 31). This discrepancy resulted in substantial basis for all counsel to argue that Dawson's testimony was contrived and not worthy of belief. Ramsey's counsel continues to rely upon it even on this appeal. (Ramsey Br. 17b).

Turner's trial counsel was also quick to pursue potential issues. Thus, when Dawson appeared to have difficulty in identifying Turner, (Tr. 73), counsel inquired whether he had been shown photographs of Turner prior to testifying obviously in order to discover if there had been some impermissible suggestion. (Tr. 373-74). The record also reveals that counsel had done his homework and was fully prepared to cross-examine Dawson on the basis of the 3500 material which had been made available to him. (Tr. 377, 391). Counsel effectively made the point that Dawson's testimony was arguably inconsistent with his earlier statements.

In briefing this issue, appellate counsel appears to concede that trial counsel's conduct does not meet the test in this circuit for ineffective assistance of counsel. (Turner Br. 25). Clearly the representation here was not so inadequate as to shock the conscience or to make the proceedings below a farce and mockery of justice. *United States ex rel. King* v. *Shubin*, 522 F.2d 527, 529 (2d Cir. 1975); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). Even under the standards of other circuits urged in Turner's brief, testing whether "reasonably effective assistance" was rendered, *Maglaya* v. *Buckhoe*, 515 F.2d 265 (6th Cir. 1975), counsel's performance more than meets the test. See *United States* v. *Joyce*, *supra*, slip op. at 5.

Following the first witness against Turner, and other witnesses against co-defendant Smith, Turner sought to substitute present counsel.* The court, however, was

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* No rational explanation appears as to how Turner, who prior to trial had filled out a financial affidavit entitling him to appointment of counsel under the Criminal Justice Act, was suddenly able during his incarceration to retain Mrs. Rosner to assume his defense. (See Tr. 935-36).

unwilling to grant Turner a severance and a continuance because the trial had already proceeded into the third week. Consequently Turner asked to proceed *pro se*.* At the Government's suggestion, (Tr. 853), the court propounded an extensive examination of Turner's knowing waiver of counsel, including a specific warning of the dangers ni proceeding *pro se*. (Tr. 934-40). See *United States ex rel. Martinez* v. *Thomas*, 526 F.2d 750, 755 (2d Cir. 1975). On this record, there can be no question but that the waiver was knowing and voluntary. See *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 133-34 (2d Cir. 1975).

POINT XI

The prosecution acted well within the bounds of propriety.

Wesley alone argues that the prosecution caused reversible error by improperly asking a question of one witness concerning the witness protection program and of another witness which elicited an answer that a co-conspirator went to jail. (Wesley Br. 23-25). The questions were propounded in good faith, sought relevant testimony and caused no error at all.

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* Turner was entitled to represent himself if he chose to do so prior to trial. *Faretta* v. *California*, 422 U.S. 806, 836 (1975). Since the trial already had begun, the decision to permit him to assume his own representation was a matter within the discretion of the trial judge. *Sapienza* v. *Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976).

A. It was not improper for the prosecution to ask James March whether he entered the witness protection program.*

On the second redirect examination of March, the prosecutor asked the following questions and received the following answers:

"Q. Prior to January 1976, were you receiving any money for days you did not appear as a witness?
A. Let me hear you?
Q. Prior to January of this year, were you receiving any money for days that you did not come to the U. S. Attorney's Office and appear as a witness?
A. No, I wasn't.
Q. On the days that you did come, did you receive money?
A. Yes I did.
Q. After January 1976 have you been receiving money every day?
THE COURT: For every day would be better.
Q. For every day.
Q. After January 6?
Q. Let me withdraw that and ask you another one. In the month of January, did you enter a witness protection program.
A. Yes, I did." (Tr. 1312).

Although the transcript does contain "Yes, I did" as the answer to the last question, the court, the prosecution and the defense later all agreed that the witness had given no answer. (Tr. 1320). Counsel on appeal agrees that "there was no answer to the question." (Wesley Br. 23). The Government submits that since there was no

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* Wesley incorrectly identifies Ann Ellis as the witness who was asked about the witness protection program. In fact, it was James March who was asked that question. (Tr. 1312).

answer, there can be no claim of error. The trial court specifically instructed the jury that "[q]uestions are not evidence." (Tr. 4132).

Even if there had been an answer, the Government submits that defense counsel had opened the door on cross-examination for questions on redirect about the witness protection program. Counsel for Barber attempted to undercut March's credibility by establishing that March had received tangible benefits in exchange for his cooperation. Thus, defense counsel elicited on cross-examination that bail was set for March in the amount of $1,000 and that March was "free." Counsel further elicited that March could "come and go as you please" (Tr. 1129); that he had been back to Washington, D.C.; and that he did not need to stay within the Southern District of New York. (Tr. 1145).

Furthermore, during March's cross-examination, defense counsel read from the transcript of a hearing where Special Agent Mangan of the Drug Enforcement Agency testified about a conversation with March. Part of the testimony read included Mangan's statement that:

> "There were several other witnesses [where March was sitting], apparently under witness protection in other cases that he had gotten to know and he was telling them he couldn't talk to them about his testimony.
>
> Q. Do you believe these people to be under protective custody?
>
> A. I believe them to be because they were there with the marshals each day. I don't know what cases they are involved in, personally." (Tr. 1168).

All counsel, including Wesley's attorney, Mrs. Piel, sought, over the Government's objection to have the portion of Mangan's testimony read to Mr. March in the jury's presence. (Tr. 1206-08).

Then, on recross-examination, counsel for Salley asked March:

"Q. What do you live on?
A. My expenses are paid by the Government.
Q. How much do they pay you?
A. $36 a day.
Q. $36 a day. Do you pay any rent for where you are staying here in New York?
A. Yes I do.
Q. Out of that $36 a day?
A. Yes, I do.

* * * * *

Q. Do they deduct taxes from that?
A. I don't know.
Q. In other words, you get $36 a day?
A. Yes, I do.
Q. And you don't work?
A. Not at present.
Q. When was the last time you worked?
A. Summer of '75.

* * * * *

Q. What did you earn?

* * * * *

A. Hundred dollars a week, $125 a week.
Q. You are doing much better now, aren't you? Since the summer you are doing much better financially?
A. I don't think so." (Tr. 1285-87).

Thus, the Government did not raise the topic of the witness protection program until after defense counsel had elicited testimony about that subject on cross-examination. Even more importantly, defense counsel sought to leave the inaccurate impression that March was a free man living on a Government payroll. It was only after all this occurred that the Government asked March on the second redirect examination whether he had entered a witness protection program. Thus, the Government's question was proper because defense counsel had more than opened the door. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 527; *United States* v. *Lubrano*, 529 F.2d at 637 (2d Cir. 1975); *United States* v. *Canniff*, 521 F.2d 565, 570 (2d Cir.), *cert. denied*, — U.S.L.W. — (1976); *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

Even if it was error to pose the unanswered question, it was certainly harmless error. There was no testimony that March's life had been threatened before he entered the program; nor was there testimony that any of the defendants on trial had made a threat on March's life. *Cf. United States* v. *Burton*, 525 F.2d 17, 19 (2d Cir. 1975) (harmless error where the witness testified on direct examination that she was in protective custody because her life had been threatened).

B. The question to the witness Ann Ellis as to where Paul DiGregorio went and her answer that "He was in jail" was entirely proper.

In the Government's opening statement, the prosecution explained to the jury that the participants in the conspiracy charged over time because "some went to jail; some dropped out; some took over their businesses, and so forth." (Tr. 12). Specifically, the opening referred to Pugliese and DiGregorio going to jail and turning over their business to Pannirello. (Tr. 21). There was no objection to these references to jail in the opening.

During the direct examination of Ann Ellis, the Government asked:

Q. Where did Paul go?
A. He was in jail. He had been . . .

Mr. Ciampa: Objection.

Mr. Pollak: May we have a side bar, your Honor?

The Court: I don't think we need a side bar. Ladies and gentlemen, Paul DiGregorio is not on trial. Forget where he was. He just went away. Forget the rest.

Q. How was it that you came to talk to Georgie after Paulie went to jail:

The Court: Come on. I just said no.
Mr. Engel: I'm sorry, Judge— (Tr. 1436).*

The Government submits that the question concerning DiGregorio going to jail was entirely proper since it was

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* Wesley argues that the "Court had ruled that this was not to come out." (Wesley Br. 24). However, the record does not bear out this assertion. While the witness Dawson was testifying the court did not permit Dawson to state that DiGregorio went to jail, instead the court instructed Dawson to say only that he "went away." (Tr. 151). The court, however, indicated that it would reconsider its ruling on the issue. (Tr. 152). At a later point in the direct examination of Dawson, the Government requested the Court to permit it to prove the incarceration of Pugliese and DiGregorio. (Tr. 229). The court indicated that it had not ruled on the issue. (Tr. 230). Later, the court decided not to permit Dawson to testify that Pugliese went to jail, although the court confined its ruling to Dawson's testimony only. (Tr. 232). It is thus evident that the court had not ruled on the issue of eliciting DiGregorio's incarceration through the testimony of other witnesses, when the Ellis incident arose. The Court, in fact, allowed the witness Pannirello to testify that Pugliese went to jail. (Tr. 1877, 2065). The prosecution acted in good faith. An affidavit to this effect was filed below, reciting essentially the same facts set forth above.

relevant to the chain of events and did not prejudice any of the defendants on trial. See *United States* v. *Burton*, 525 F.2d 17, 19 (2d Cir. 1975); *see also United States* v. *Tramunti*, *supra* at 1118. Indeed, none of the defendants was alleged to have associated directly with DiGregorio and thus can hardly claim that testimony of DiGregorio's arrest cast them in a bad light.

In any event, it is difficult to believe that counsel was seriously concerned with the mention of a co-conspirator going to jail since on other occasions when the subject of co-conspirators, including DiGregorio, going to jail was mentioned (including mention by defense counsel), no objection was made. (*See, e.g.*, Tr. 237; 1675; 2975; 3221). Furthermore, if there had been any prejudice, it was surely cured by the trial court's immediate instruction to the jury to "forget where [DiGregorio] was. He just went away. Forget the rest." (Tr. 1436). See *United States* v. *Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971). The follow-up question, if harmful, was cured by the trial court's instruction that questions are not evidence. (Tr. 4132-33).

POINT XII

The alleged inconsistencies as to Ramsey were isues of fact properly left for the jury to resolve.

Ramsey's claim that he was convicted on the basis of "obviously tainted or collaborated testimony" is without merit. (Ramsey Br. 17). This argument is no more than a claim that the testimony of Dawson and March was inconsistent or contradicted by other witnesses. The inconsistencies here do not rise to the level of "false testimony" in the sense used by the cases relied on by Ramsey.* They are, at worst, mistakes in recollection, or

* There is no claim that the prosecution below suborned or condoned perjury. *Cf. Napue* v. *Illinois*, 360 U.S. 264 (1959).

simply different recollections. Resolution of these differences was properly left to the jury, which is entitled to determine whether the inconsistencies undermined or supported the credibility of the witnesses. See *United States* v. *Andrino*, 497 F.2d 1103, 1107-08 (9th Cir.), *cert. denied*, 419 U.S. 1048 (1974); *United States* v. *Dunn*, 494 F.2d 1280, 7281 (8th Cir.), *cert. denied*, 419 U.S. 855 (1974); *United States* v. *Birnbaum*, 373 F.2d 250, 257 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967). Ramsey presents no evidence of "collaboration," and, in fact, any such claim is belied by the very inconsistencies upon which he relies. Accordingly, Ramsey's claim of tainted testimony should be rejected as frivolous.

POINT XIII

The selection of the jury was proper.

Several arguments are raised with respect to the selection of the jury. Wesley and Green complain that counsel for Warren Robinson, who was subsequently severed prior to the swearing-in of the jury, acted as lead counsel during the jury selection. Wesley further contends that the district court improperly required counsel to exercise peremptory challenges without first impanelling the twelve jurors and then permitting additional challenges to the alternates. Wesley also attacks the insufficiency of the voir dire. Each of these alleged errors regarding the jury selection is without merit.

A. The participation of counsel for Warren Robinson in the jury selection was entirely proper.

Warren Robinson was charged in Count Two of the indictment with violating 21 U.S.C. § 841 ("continuing

criminal enterprise") in addition to Counts Four, Six, Nine, Ten and Eleven, charging substantive violations of 21 U.S.C. § 841 (See footnote at 3, *supra*). Throughout the entire jury selection, it was justifiably assumed that Robinson would remain as a defendant in the case. At a pre-trial conference held on November 21, 1976, the Court appointed Mr. Fisher as lead counsel. (Tr. 11-21-76, 9). At that time the court described his function as coming to "side bar conferences unless there is a problem with one attorney" and being "responsible for seating arrangements." (*Id.* at 15). No objection was registered at that time to Mr. Fisher's appointment as lead counsel.*

The day the jury selection began, the court explained to counsel:

> "I am projecting this trial to go for seven weeks. All jurors will be first asked whether that would be a hardship to them. I suspect this morning I will be hearing excuses as to why it would be a hardship to them. Often the hardship which they wish to spell out is something that is quite private. Unless there is objection from some counsel, Mr. Fisher can come up and hear it, but I don't think that we have to have it in open Court if it is private.
>
> Does anyone object to that kind of procedure? (S. 9).

Mrs. Piel, counsel for Wesley then stated: "I anticipate a problem with it, I anticipate no problem if a juror is excused. If a juror is not excused, then I think it be-

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* Although Mrs. Piel, Wesley's attorney, had not been appointed to represent Wesley at the time of this pre-trial conference, upon entering the case she was surely responsible for learning the procedures for trial which were previously announced. Green's attorney was present at this conference.

comes quite important to know almost exactly what the juror said." (S. 10). Other counsel then stated their respective positions.*

The jury selection commenced. A review of the minutes of the jury selection reveals only one instance when Mr. Fisher approached the side bar alone in connection with a hardship excuse. In that instance the prospective juror had already announced in open court that she did not wish to serve because she had recently obtained employment with the Girl Scouts. (S. 21-22). Mr. Fisher then approached the bench at the court's request, and stated that the defense had no objection to the juror being excused. (S. 22). The remaining hardship excuses were heard by the Court alone without objection, with each complaining juror excused (S. 15-249 *passim*).

This Court has upheld the selection of a jury with the district court *alone* hearing hardship excuses. *United States* v. *Woodner*, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963). Accordingly, there can be no error in the designation of lead defense counsel for these purposes. Moreover, in making this argument Wesley and Green have been unable to specify anything which Fisher did in his capacity as lead counsel which may have caused any prejudice. In the only instance where Mr. Fisher acted as lead counsel for the purpose of hearing hardship excuses,** the juror had already ex-

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* Hansen: S. at 12 (asking to be present at any discussion with a juror); Ramsey: S. at 14 (objecting to the procedures): Turner: S. at 14 (asking Fisher to caucus with other counsel to get a consensus before a decision is made on hardship applications).

** The only other time when Fisher approached the bar in that capacity was to request an additional voir dire question on behalf of all defense counsel. (S. 84).

pressed the basis for the hardship in open court. Mrs. Piel's only objection to Mr. Fisher's hearing hardship excuses was that she wanted to hear exactly what the juror had said, in the event that the juror was not excused. She was not denied that opportunity at any point.

Equally without merit is Green's argument that Mr. Fisher should not have been permitted to vote on defendant's peremptory challenges. Mr. Fisher participated because it was fully expected that his client, Robinson, would proceed to trial. It was only after the final selection of the jury that the court granted Robinson's motion for severance.* Any influence which Mr. Fisher may have exercised in the deliberations among counsel concerning peremptory challenge may be attributed to the willingness of counsel to accept Mr. Fisher's views as sound. Indeed, the record indicates that each counsel was

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* Prior to the jury selection, the court ruled that it would bifurcate Count Two by submitting it to the jury after it reached a verdict on the remaining counts. On the afternoon of the first day of jury selection, Mr. Fisher announced for the first time that in connection with the substantive counts he intended to state in his opening statement to the jury that Robinson had been convicted of the conspiracy charged in this case and that Robinson would testify only as to Count Two. (S. 29). Mr. Fisher therefore requested a voir dire question to the jury on this issue. All counsel promptly moved for a severance from Robinson. (S. 71-72). The following morning, the Government suggested that if the court severed the substantive counts and reconsidered its decision to bifurcate the submission of Count Two to the jury. Robinson would testify at the trial, thereby mooting co-defendants' motion to sever on the ground that they wanted to call Robinson as a witness for their case. (S. 90-91). The court stated it had reached no decision of the other defendants' motion to sever. (S. 160). On the afternoon of the thrid day of jury selection Robinson finally moved for severance. (*Id.* at 2000-09; JA 360-61). The remaining counsel also moved for severance. (S. 211). On the following day Robinson's motion for a severance was granted. (S. 282; JA 371).

permitted to state his views and to cast his own vote on the peremptory challenges. (S. 270; JA 367) This Court has already upheld requiring counsel in multi-defendants cases to exercise their challenges unanimously. *United States* v. *Aloi*, 511 F.2d 585, 598 (2d Cir. 1975). Robinson's ultimate severance had no effect on the impartiality of the jury which was selected, see *United States* v. *Parker*, 103 F.2d 857, 862 (3d Cir.), *cert. denied*, 307 U.S. 642 (1939), and the jury was no less impartial merely because Mr. Fisher participated with all other defense counsel in its selection.

B. The court properly afforded counsel abundant peremptory challenges.

On January 21, 1976, when the trial was originally scheduled to begin, Judge Duffy announced:

> "We are going to pick a jury of 12 plus four alternates.
>
> All challenges will be across the board.
>
> I am not sure you may understand what I am talking about.
>
> I am going to put 16 people in the box for openers.
>
> You can challenge anybody you want, alternate or regular juror.
>
> The defense, in view of the fact that we do have four alternates, will be given four extra challenges.
>
> The Government, since you fellows are getting twice as much, we'll be given two extra challenges, unless somebody objects, at which point all extra challenges will be waived.
>
> Mr. Fisher: Your Honor, am I to understand that the defendants have 20 challenges, then?

The Court: Come on, you know the rules as well as I do to the number of challenges.

* * * * *

Mr. Fisher: So we will have 16 and the government has 8?

The Court: That is correct.

Does anyone object to that?"

(Tr. 1/21/76, 13-14)

There was no objection by any defense counsel.*

Wesley's argument that the trial court erred in not giving additional peremptory challenges for alternates is baseless since the court specifically stated that the additional four challenges were premised on the fact that four alternate jurors would be selected. Moreover, there was no prejudice to Wesley. The record reveals that Wesley's objection to the jury was based on the fact that he did not have the opportunity to challenge juror number three, who was not an alternate. (S. 284). However, in any event, the district court complied with the rules insofar as they require additional challenges when alternate jurors are sworn, Rule 24(b) F.R. Crim.P., and reversal on this ground is not warranted unless the trial court abused its discretion in the procedure it followed. See

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* This occurred at a pre-trial conference about a week prior to commencement of trial. Although counsel for Wesley, Mrs. Piel, attended this conference, the record reflects that she was absent from the courtroom for a short time, possibly during these statements by the court. However, whether or not Mrs. Piel was in the courtroom at the very moment that the court described its plans for the allotment of challenges, she was being provided with daily copy of the transcript (Tr. 1/21/76 at 3), and she must be charged with knowledge of how the challenges were to be exercised. Prior to the selection of the jury, she voiced no objection to the announced procedure.

United States v. *Franklin*, 471 F.2d 1299 (5th Cir. 1973); *United States* v. *Bentley*, 503 F.2d 957 (1st Cir. 1974). Absent any evidence that the jury as finally selected was other than representative and impartial, there should be no reversal. See *Untied States* v. *Projansky*, 465 F.2d 123, 140-41 (2d Cir.) *cert. denied*, 409 U.S. 1006 (1972); *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 69 n 6 (1st Cir. 1968) *cert. denied*, 393 U.S. 1036 (1969).

C. The trial court adequately inquired of the jurors on the voir dire.

Wesley complains that the trial court's failure to inquire into the jurors' educational backgrounds and to elicit information concerning their children constitutes reversible error. This argument is also without merit.

It is settled law that questions to be asked on voir dire are a matter of discretion with the district court. *United States* v. *Cowles*, 503 F.2d 67 (2d Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); *United States* v. *Wooten*, 518 F.2d 943, 945 (3d Cir. 1975); *United States* v. *Owens*, 415 F.2d 1308, 1315 (6th Cir. 1969), *cert. denied*, 397 U.S. 997 (1970); *Maguire* v. *United States*, 358 F.2d 442 (10th Cir.), *cert. denied*, 385 U.S. 870 (1966). Accordingly, failure to ask certain questions is within the trial court's discretion. *United States* v. *Hill*, 500 F.2d 733 (5th Cir. 1974). Refusal to inquire into the spouse's occupations has been held not reversible. *United States* v. *Staszcuk*, 502 F.2d 875, 882 (7th Cir. 1974). Inquiry into children's occupations hardly can be deemed more probative than inquiry into a spouse's occupation, and, accordingly, there was no error here. See *United States* v. *Keen*, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). Nor does refusal to inquire into each prospective juror's educational background rise to the level of abuse of discretion. Cf. *Pinkney* v. *United*

States, 380 F.2d 882 (5th Cir. 1967), *cert. denied*, 390 U.S. 908 (1968). The voir dire was done with great care over a four day period and was more than adequate to provide "some basis for a reasonably knowledgeable exercise of the challenge." *United States* v. *Lewin*, 467 F.2d 1132, 1137 (7th Cir. 1972). According, there was no abuse of discretion. See *Ristaino* v. *Ross*, 424 U.S. 589, 594-95 (1976).

POINT XIV

The district court's communications with one juror do not require reversal.

Green and Wesley each complain that a private communication between the court and juror number three after deliberations had begun warrants reversal. (Green Br. 29-32; Wesley Br. 31). This point is without merit.

The Government does not know the contents of that conversation. However, the record reveals the following:

> "THE COURT: The man is willing to serve. He is serving well. That is all you need to know. His personal problems are none of your business; in fact, almost none of mine.
>
> I feel at this point almost under a seal of confession, and I am not going to disclose it to you or anybody else, and that is it, the end.
>
> MR. ENGEL: Your Honor, may I just inquire:
>
> I take it Mr. Allen's personal problem has nothing whatsoever to do with the deliberations—
>
> THE COURT: I already said that.
>
> MR. ENGEL: —and with any time problem.

THE COURT: I already said that.

MR. ENGEL. That is all I wanted to hear.

MR. SCHMUKLER: I am not sure that has been said. We were concerned because the juror approached the bench to speak to your Honor two or three times—

THE COURT: Wait a second: I already said that. It's finished, it's over, it's done with.

* * * * *

MR. ENGEL: I would like to note for the record that Mr. Allen, when leaving [for] the jury room on two occasions, I remember, perhaps three, left the box and went up to your Honor, and spent perhaps fifteen, thirty seconds talking to your Honor, and left, and your Honor's statements today indicate whatever Mr. Allen said, they had nothing to do with any time impingement or any problem as to the length of the deliberations.

THE COURT: I said it once. You don't have to repeat it.

God have mercy.

* * * * *

MR. ENGEL: Your Honor, the Government would think the better practice would be to put it on the record, seal it, and what your Honor could do for purposes of here in court, take the court reporter in the robing room and seal it.

I think that is the procedure.

THE COURT: That I will do." (Tr. 4302-03).

The Court did transcribe the substance of the conversation and order the transcript sealed. (Tr. 4304-05). That transcript is available to this Court.

The Government submits that upon this record, it is appropriate to reject Green's and Wesley's claim, since there has been no "showing of prima facie prejudice" and it appears that the "private communication or contact with a juror during [the] trial [did] not relate to a matter pending before [the] jury." *United States* v. *Lubrano*, *supra*, 529 F.2d 633; *United States* v. *Brasco*, 516 F.2d 816 (2d Cir. 1975).

In similar circumstances, when a trial court made a record after the fact of his conversations with the jury, Judge Learned Hand wrote:

> "After the jury had been locked up, they sent out a note, asking that Barger's testimony against D' Andrea should be read to them; and the judge, who apparently left the court room, on his way back to it 'stopped in the jury room and asked if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we came back'. . . As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up, and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room . . . But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would appear to be the merest pedantry to insist on procedural regularity . . . There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused.
>
> *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945) (citations omitted).

In this case, unlike *Compagna*, the trial court did not communicate with the entire jury. Rather, the communication was on an individual basis. Nor, evidently, did the communication concern the testimony, as in *Compagna*, nor the verdict, as in *Rogers* v. *United States*, 422 U.S. 35 (1975), relied upon by appellants. Instead, it would appear that the communications were entirely personal in nature. Even that communication apparently did not bear on the juror's willingness or ability to serve, nor did it cause him to try to end the deliberations quickly. Under these circumstances, upon a review by the Court of the sealed transcript, it would be appropriate to apply the harmless error rule.* Rule 52(a), F.R. Crim. P.; see *e.g. United States* v. *Reynolds*, 489 F.2d 418 (6th Cir. 1973), *cert. denied* 416 U.S. 988 (1974); *United States* v. *Arriagada*, 451 F.2d 487 (4th Cir. 1971), *cert. denied*, 405 U.S. 1018 (1972); *United States* v. *Howard*, 433 F.2d 1 (5th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971); *United States* v. *Schor*, 418 F.2d 26 (2d Cir. 1969); *Ware* v. *United States*, 376 F.2d 717 (7th Cir. 1967); *United States* v. *Hoffa*, 367 F.2d 698, 713 (7th Cir. 1966), *vacated on other grounds*, 387 U.S. 231 (1967); *Rice* v. *United States*, 356 F.2d 709, 716-17 (8th Cir. 1966); *Walker* v. *United States*, 322 F.2d 434 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964) ("the trial judge's impropriety in communicating with the jury out of the presence of Leroy Walker does not require reversal if the record affirmatively shows the communication had no tendency to influence the verdict against him") *Dodge* v. *United States*, 258 Fed 300 (2d Cir. 1919).

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* Although counsel did not specifically assent to the communication now assigned as error, other references in the transcript reveal that counsel on previous occasions actually had consented to the informal communications with jurors regarding matters not related to the issues in the case. (Tr. 4009; 4219).

POINT XV

Dawson's testimony did not preclude the jury from deciding whether a conspiracy existed.

Rufus Wesley claims that Dawson's testimony that he had an "agreement" with Wesley prevented the jury from deciding whether there was a conspiratorial agreement. This argument is frivolous.

Dawson was asked on direct examination whether he had an agreement with anyone as to the price to be charged for the heroin which he, Robinson, and Wesley purchased in New York. (Tr 182). Counsel for Wesley objected, *inter alia*, on the ground that the question called for a conclusion. (Tr. 182-83). Thereafter, counsel for Wesley withdrew her objection. (Tr. 184).* Dawson then responded that he had an agreement with Robinson and Wesley that the heroin was to be sold for a price between $18,000 and $22,000 a kilogram and that the heroin was to be diluted before sale by adding one kilogram of lactose or mannite to each kilogram of heroin purchased from Pugliese. (Tr. 186). Dawson was again asked about his "agreement" with Wesley and Robinson later in his direct examination when the prosecutor, in an attempt to show the basis of the "agreement," elicited from Dawson the conversation in which it was reached. (Tr. 264-65). In response to that question, Dawson briefly recounted the conversation in which the agreement was reached. (Tr. 265-67).

Wesley's claim that the testimony with respect to the "agreement" was conclusory and, therefore, improper is

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* Counsel for Wesley attempted to reinstate her withdrawn objection on the next day of trial, which was four days after the testimony came in. (Tr. 215-16). This kind of belated objection cannot be fairly characterized as a timely preservation of the issue.

groudless Dawson testified to the specific conversation in which the agreement was reached and therefore the jury had before it the basis of Dawson's "conclusion" that an agreement was reached. Moreover, counsel for Wesley explicitly withdrew her objection to the question whether an agreement had been reached thus foreclosing review of her present complaint. Rule 52(b), F.R.Crim.P., *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Finally, the issue was not removed from the jury's consideration; the jury was properly charged that they were the sole judges of credibility and that they must find the existence of the conspiracy and individual membership therein evidenced by a shared common purpose or plan. (Tr. 4131, 4159-60).*

POINT XVI

Wesley's right to be present at trial was properly protected.

Wesley was arrested and held on a warrant in the District of Columbia, with the result that he was absent from the trial of this case on March 8, 9, and 10,

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* Wesley was also convicted on Count Five, a substantive count, and received a concurrent sentence of eight years with his conviction on the conspiracy count. Since his claim of prejudice here relates only to the conspiracy count, this Court may properly decline under the concurrent sentence doctrine, to review that conviction. *Hirabayshi* v. *United States*, 320 U.S. 81 (1943); *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16 (1973); *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *United States* v. *Gaines*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *United States* v. *Cilenti*, 425 F.2d 683 (2d Cir. 1970); *United States* v. *Febre*, 425 F.2d 107 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States ex rel. Weems* v. *Folette*, 414 F.2d 417 (2d Cir. 1969) (collateral attack), *cert. denied*, 397 U.S. 950 (1970).

1976.* (Tr. 2332, 2571-72, 2697-98). The defendant now claims that his right to be present at trial was thereby violated. (Wesley Br. 28-31). That argument is meritless.

As this Court stated in *United States* v. *Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972):

> "Like any constitutional guarantee, the defendant's right to be present at trial may be waived, even if that waiver is implied from the defendant's conduct."

See also Taylor v. *United States*, 414 U.S. 17 (1973); *Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975); *United States* v. *Peterson*, 524 F.2d 167, 183-84 (4th Cir. 1975), *cert. denied*, — U.S.L.W. — (1976); *United States* v. *Marotta*, 518 F.2d 681, 683-84 (9th Cir. 1975). In this case, upon the return of the defendant Wesley to the trial courtroom on March 11, 1976, Judge Duffy advised Wesley of the proceedings held in his absence (Tr. 2701-02), arranged for him to have a copy of the transcript of those proceedings (Tr. 2703), and told the defendant:

> "Mr. Wesley, I want you to go through that. If it raises any questions whatsoever, I want you to discuss it with your lawyer and if need be, we will call back whoever was testifying at that time, okay?" (Tr. 2703).

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* The defendant does not claim that the Government intentionally caused his absence from trial on the dates indicated or that the prosecutors in this case had any advance knowledge of the District of Columbia arrest. Indeed, the record shows the opposite to have been true. (Tr. 2572).

The defendant chose not to request the repetition of any of the testimony he had missed. Nevertheless, on March 19, 1976, Judge Duffy again advised the defendant that the witnesses would be recalled if Wesley so desired. (Tr. 3459). Thus, having been presented with a full opportunity to have the days of trial which he had missed repeated, and having declined to take advantage of that opportunity, the defendant Wesley waived his right to be present as to those days. *See Parker* v. *United States*, 184 F.2d 488, 490 (4th Cir. 1954); *United States* v. *Crutcher*, 405 F.2d 239, 243 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

In any event, even if the right to be present had not been waived, Wesley suffered no prejudice from his absence. Almost all of the testimony heard during the three days did not deal with Wesley. (Tr. 2701-02). Considering that fact, as well as the opportunity which he was given to review a transcript of the missed testimony and to have any witnesses recalled, if there were any error at all, it was harmless.* *See, e.g., United States* v. *Calabro*, 467 F.2d 973, 989 n. 7 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Schor*, 418 F.2d 26, 30 (2d Cir. 1969); *United States* v. *Mesteth*, 528 F.2d 333, 335 (9th Cir. 1976); *United States* v. *Bokine*, 523 F.2d 767, 770 (5th Cir. 1975); *United States* v. *Baltierra-Frausto*, 472 F.2d 597, 598 (9th Cir. 1973); *United States* v. *Reynolds*, 489 F.2d 4, 8 (6th Cir.), *cert. denied*, 416 U.S. 988 (1973).

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* It should also be noted, as the defendant concedes, that he voluntarily absented himself from the courtroom on numerous other occasions during trial. (Wesley Br. 18).

POINT XVII

Pannirello was properly permitted to testify about Salley.

Henry Salley contends that it was error for the trial judge to refuse to instruct the jury that they might not infer from Pannirello's testimony that the person he knew only as "Salley" was the defendant Henry Salley. This contention is frivolous.

Pannirello was prepared to identify Salley at trial, but the district court prohibited him from doing so because of his previous failure to do so in *Tramunti*. (Tr. 1891-92, 1898, 1909). Pannirello did testify, however, concerning a meeting he and Jimmy Provitera had at the Howard Johnson's Motor Inn with Warren Robinson and a man named "Salley." (Tr. 2136-38).

Pannirello's testimony about Salley, however, stood on its own and, like any other testimony, was to be given the weight the jury wished. The testimony, of course, was amply corroborated by each of four other accomplices who identified Salley as a lieutenant of Robinson and specifically by Provitera who testified about the same meeting. (Tr. 2535-37). In addition, a hotel registration card placed Salley with Robinson at the Howard Johnson's at the time Pannirello testified. (GX 62). The jury was certainly entitled to infer the obvious: that "Salley" was Salley.

POINT XVIII

The sentence imposed on the defendant Salley was in all respects proper.

Defendant Salley argues that the five-year sentence imposed by Judge Duffy is "in effect" more severe than the five-year sentence imposed pursuant to the previous conviction of Salley which was reversed on appeal. (Salley Br. 14).* This is so, the defendant contends, because:

> "[i]t is possible that the defendant may not receive the same consideration for parole he would have received had he remained in confinement [*sic*] for a longer period of time that [*sic*] he might have remained had he not exercised his constitutional right of appeal under the 14th Amendment as was stated in *North Carolina* v. *Pierce* [*sic*] [395 U.S. 711 (1969)]. at 722." (Salley Br. 14-15).

The defendant's argument is frivolous.

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* On April 22, 1974, Henry Salley was sentenced to a term of five years' imprisonment plus three years' special parole in *United States* v. *Tramunti*, 73 Cr. 1099 (S.D.N.Y.). Salley's conviction in that case was, however, reversed on appeal. *United States* v. *Tramunti*, *supra*.

Upon imposing sentence following Salley's conviction in this case, Judge Duffy stated as follows:

> "The judgment of this court is that the defendant, Henry Salley, will be remanded to the custody of the Attorney General for a period of five years; all prior time, whether prior to sentence or after sentence, will be deducted from the sentence; that includes today, so as to permit him consideration at the earliest time. The special parole period of three years will be added to that." (Tr. 5/14/76, 7).

The defendant concedes that Judge Duffy "acted properly and in accordance with law in sentencing the defendant-appellant Henry Salley to a term of imprisonment of five years. . . ." (Salley Br. 14). It is also clear that Judge Duffy complied with *North Carolina* v. *eParce*, *supra*, in that (a) he gave the defendant the same sentence as had been imposed after the first trial and (b) he gave the defendant full credit for all time already served. In *United States* v. *Pacelli*, 521 F.2d 135, 141 n. 6 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), this Court upheld the imposition, after a retrial, of the identical life sentence initially imposed even where the judge made the second life sentence run consecutivly to an intervening narcotics conviction. That second sentence had a more severe collateral consequence than Salley's complaint here and was specifically found not to violate the strictures of *North Carolina* v. *Pearce*, *supra*.

As to the defendant's argument that he *may* receive different treatment for purposes of parole than he might have received had he not appealed his first conviction, it must be noted that Judge Duffy specifically provided that credit be given for time served "so as to permit consideration [of the defendant for parole] at the earliest time. . . ." Particularly in light of Judge Duffy's comment on the record, there is no basis for assuming that Salley would receive any different consideration for parole than he would have received after his conviction in the first case. Thus, Salley's claim of "harm" to him is completely speculative.*

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* Parole is not a matter usually or properly treated by the district judge at time of sentence. Should any eventual application by Salley for parole result in a violation of his rights, he will be able to obtain redress in the usual course at that time under the provisions of 28 U.S.C. §2242.

Finally, the defendant claims that "the trial court has abused its discretion in this case, and that it has failed to take into consideration the totality of the circumstances involved in this case." (Salley Br. 15). The defendant concedes, however, that the sentence imposed is within statutory limits (Salley Br. 14), and there is nothing to indicate that Judge Duffy relied on any impermissible factors or material inaccuracies in fixing sentence. Accordingly, the defendant's sentence is not reviewable in this Court. *Dorszynski* v. *United States*, 418 U.S. 424 (1974). See, *e.g.*, *United States* v. *Tramunti*, *supra*, 513 F.2d 1087, 1120 (2d Cir. 1975); *United States* v. *Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973).

POINT XIX

Judge Duffy properly charged the jury as to the subjects of the defendant Green's requests two and three.

The defendant Al Green contends that one important element of his requests to charge numbered two and three was not properly included in Judge Duffy's instructions to the jury, although Judge Duffy had granted both requests. (Green Br. 24). Specifically, those requests concerned accomplice testimony; the burden of the Government to prove its case beyond a reasonable doubt; and the requirement of individual proof against the defendant Green. This point is totally frivolous since Judge Duffy included the substance of each of these requests in the charge to the jury.*

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* Green's Requests to Charge Nos. 2 and 3 were as follows:

"That both Harry Panirello [*sic*] and James Provitera are considered to be accomplices in the alleged conspiracy. That I charge you that you must carefully scrutinize accomplice testimony and consider it with caution.

[Footnote continued on following page]

With respect to accomplice testimony, Judge Duffy charged as follows:

> "Certain of the witnesses who testified said in their testimony that they were accomplices to the crime charged against some of the defendants on trial.
>
> I tell you that that testimony is to be weighed with caution and care. An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such witness may well have an important personal stake in the outcome of the trial. An accomplish [*sic*] so testifying may believe that the defendant's acquittal can vitiate some expected reward that may have been either promised or suggested implicitly, of course, in return for his plea of guilty and his testimony.
>
> The fact that these witnesses are accomplices is not in and of itself reason to reject their testimony. Weigh their testimony carefully and with caution. Accept or reject that which you feel is believable, that which is unbelievable reject. (Tr. 4137-38).

In this instruction, Judge Duffy properly and fully stated the law as to accomplice testimony. *See, e.g., United States* v. *Araujo*, Dkt. No. 76-1085 (2d Cir. July 26, 1976) slip op. 5101, 5105; *United States* v. *Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975).

If after careful consideration you find the defendant, Al Green, was not proven guilty beyond a reasonable doubt by the Government through the testimony of either or both Harry Panirello [*sic*] and James (Jimmy) Provitera, after applying the rules of the presumption of innocence as presented to you by the Court, I charge you that you that you must acquit the defendant Al Green, on all counts of the indictment."

Judge Duffy also repeatedly instructed the jury that the Government must prove each element of each count charged beyond a reasonable doubt (Tr. 4146-47, 4155, 4174, 4176) and that the proof against each defendant must be considered individually (Tr. 4143, 4159, 4172), concluding:

> Let me remind you again, the Government to prevail must prove with respect to each count the essential elements beyond a reasonable doubt. I have already explained to you before in these instructions if it succeeds, your verdict should be guilty. If it fails, your verdict must be not guilty.
>
> You must consider each count separately and render a separate verdict as to each count. You must consider each defendant separately and render a separate verdict to each defendant.

Additionally, Judge Duffy properly charged the jury that it was for them to determine the facts and weigh the evidence according to their recollection of the evidence. (Tr. 4129, 4131, 4182). *See Untied States* v. *Natale*, 526 F.2d 1160, 1167-68 (2d Cir. 1975); *United States* v. *De La Motte*, 434 F.2d 289, 292 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

Thus, all of the elements of law incorporated in the deendant Green's requests were properly charged by Judge Duffy, leaving the facts to the jury. Whether to comment specifically upon the evidence was a matter for Judge Duffy's discretion, *see United States* v. *Natale*, *supra; United States* v. *Tourine*, 428 F.2d 865, 869-70 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), and the defendant has made no showing, either at trial or before

this Court, that Judge Duffy abused his discretion in refraining from comment on the evidence.*

POINT XX

The trial court correctly found that Pannirello's identification of Green was not the result of an impermissibly suggestive photograph display.

Green argues that the trial court should not have permitted Harold Pannirello to make an in-court identification of Green. This point is without merit since the trial court permitted the identification after a hearing outside the jury's presence at which it determined the in-court identification was not based on an impermissibly suggestive photographic display. (Tr. 1903-2056).

At the hearing held to determine whether the in-court identification should be permitted, Pannirello testified that he was shown Green's photograph with a "bunch" of other photographs between the time of his grand jury testimony and trial testimony in the *Tramunti* case. (Tr. 1959, 1943). Pannirello proceeded to identify Green in

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* Wesley also claims, for the first time on appeal, that the Court's failure to marshal the evidence was error (Wesley Br. 20). This complaint ignores the settled rule that it is firmly within the discretion of the trial judge to determine whether he will comment upon, or summarize, the evidence. *United States* v. *Tourine, supra*, 428 F.2d at 869; *United States* v. *Tramunti, supra*, 513 F2.d 1087, 1120; *Lowther* v. *United States*, 455 F.2d 657, 664-65 (10th Cir.), *cert. denied*, 409 U.S. 857 (1972); *Cf. United States* v. *Natale, supra*, 526 F.2d 1160, 1167; *Radiation Dynamics, Inc.* v. *Goldmunt*, 464 F.2d 876, 889 (2d Cir. 1972); *United States* v. *Dozier*, 522 F.2d 224, 227 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States* v. *DeLaMotte*, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

the courtroom. (Tr. 1944). Pannirello also testified at the hearing that he met Green approximately fifteen times, although it could have been ten or twenty. (Tr. 1990). He said that each meeting occurred at Green's apartment between 1971 and 1972. (Tr. 1990-91).

Special Agent Richard Mangan of the Drug Enforcement Agency testified that in September 1974 he showed Pannirello pictures of many people but not of Green. (Tr. 1905-08). Special Agent Fred E. Moore testified that in July and August 1973 he showed Pannirello photographs of Al Green in a spread of approximately five or six pictures and that Pannirello identified Green. (Tr. 2002, 2039). On cross-examination Agent Moore also testified that Pannirello had given Moore a description of Green prior to identifying the photograph. (Tr. 2037).

Based on this evidence, the district court held the in-court identification would not be suppressed. (Tr. 1056). Pannirello was then permitted to repeat his testimony before the jury and to identify Green in their presence. (Tr. 2059).

In these circumstances, there was no possibility that the photograph of Green showed by Agent Moore to Pannirello in a spread more than two and one-half years earlier was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). There is no doubt on this record that Pannirello's in-court identification of Green stemmed from his observation of Green on approximately fifteen occasions when he delivered heroin to Green rather than from his identification of Green's photo among a spread of five or six Negro males. (Tr. 2039). The independent basis of the identification was well bolstered by the fact that Pannirello had described Green to Agent Moore before any photo-

graphs were shown. Thus there was no basis for concluding that there was any taint whatsoever. See *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970) (upholding identification based on 20-30 second glance); see also *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Mysholowsky* v. *People of New York*, 535 F.2d 194 (2d Cir. 1976) (upholding identification based on thirty-eight second encounter); *United States ex rel. Pella* v. *Reid*, 527 F.2d 380 (2d Cir. 1975) (upholding identification based upon ten to fifteen second observation seventy feet away); *United States* v. *Yanishefsky*, *supra*, 500 F.2d 1327 (upholding identification based on brief view of defendant's profile); *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States* v. *Evans*, 484 F.2d 1178, 1185 (2d Cir. 1973) (upholding identification based on several minutes observation); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801-01 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973) (upholding identification based on observation of bank robber one foot away); *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir. 1972), *cert. denied*, 406 U.S. 927 (1972) (upholding identification based on observation for fifteen seconds twenty feet away).

On this issue of taint, Green directs the Court's attention to a point on the record where the prosecutor stated that he asked Pannirello whether he had seen Green in the courtroom and Pannirello said he had not.* Green's brief then asks rhetorically, "How did his perception on the following day become so acute that Pannirello iden-

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* As is evident from a later discussion in the transcript, the prosecutor believed that the record was inaccurate at the point where it reflected that Pannirello said that he did not see Green in the courtroom. Assistant United States Attorney Engel attempted to correct the record on that point, and no objection was raised by any defense counsel. (Tr. 2240).

tified Green, among others, in open Court?" (Green Br. 35-36). Defense counsel thus suggests that during the overnight recess the Government told Pannirello which person in the courtroom was Al Green. Although defense counsel feels free to raise the suggestion now, when given ample opportunity to cross-examine Pannirello at the *Simmons* hearing with regard to any taint of his identification of Green, defense counsel chose not to ask a single question about any such impermissible suggestions by the Government. He did not even ask Pannirello whether he had told the prosecution on the previous day that he had been unable to identify Green. Having studiously avoided ihs opportunity to make a record on this point, Green cannot now argue that such undisclosed misconduct by the Government in fact occurred.

POINT XXI

Pannirello's testimony about a "bust" did not prejudice Green.

Green complains that the witness Pannirello's reference to hearing on the radio about a "bust" at 1380 University Avenue was so prejudicial that he should be accorded a new trial. (Green Br. 36-38). This contention is without merit. After the statement by the witness, the district court immediately gave a careful instruction to the jury that they should disregard the remark and that the whole matter had nothing to do with the defendants at trial.* The curative instruction was entirely appropriate and specifically prevented the jury from concluding

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* Counsel for Wesley argued to the district court, as Green does here, that the witness was intentionally poisoning the proceedings. That contention was rejected by Judge Duffy as "the most outrageous thing I have ever heard." (Tr. 2150).

that any of the defendants on trial had been arrested in the "bust." Defense counsel, who requested an instruction, took no exception to the instruction which the Court gave. (Tr. 2131-32). If there was error, it must be deemed cured. *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). In any event, the remark was made in the middle of eight-week long trial during which the jury heard thousands of pages of testimony and thus could not have served to deprive Green of a fair trial.* *United States* v. *Hinton*, Dkt. No. 75-1042 (2d Cir. Sept. 27, 1976) slip op. 5679, 5704.

POINT XXII

The introduction into evidence of heroin purchased from Smith and seized from Hansen did not prejudice Green.

Green claims that the introduction of the heroin, cocaine, and lactrose exhibits was so inflammatory that it requires a new trial. This contention is frivolous.

At the trial below, the Government introduced into evidence approximately 61 grams of heroin and 48 grams of cocaine purchased by an informant from the defendant Walter John Smith, as well as two containers of lactose seized from Smith's store. (Tr. 706, 774, 779-81; GX 20B, 21D, 21E, 23, 24). It also introduced heroin exhibits and paraphernalia seized from Basil Hansen's apartment on October 4, 1973. (GX 72-79). The introduction of this evidence was clearly proper as, in both

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* The testimony, moreover, was admissible to show the reason Pannirello stopped dealing with Green in his apartment. There was no mention that Green or that any defendant or coconspirator was the subject of the "bust." (Tr. 2128-29).

cases, the evidence showed that the defendants possessed the narcotics and paraphernalia in the course of the conspiracy charged. There was no proof of other crimes, *Cf. United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975), *cert. denied*, -- U.S.L.W. — (1976), and, therefore, the trial court need only decide whether the probative value outweighs its prejudicial impact. *United States* v. *Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975). The introduction of this physical evidence was obviously "more than only slightly probative" as it tends to show a state of mind of Smith and Hansen, tends to show the existence of the conspiracy, and tends to corroborate the testimony of the accomplices who testified. *United States* v. *Bermudez*, *supra*, 526 F.2d 89, 96; *United States* v. *Tramunti*, *supra*, 513 F.2d 1087, 1116. Moreover, the jury was instructed that drugs seized from the Hansen's apartment were to be considered only against Hansen and only as against him, on Count Fourteen. This instruction clearly limited the prejudicial impact of the Hansen narcotics, *United States* v. *Bermudez*, *supra*, 526 F.2d 89, 96 n.4 and was, in any event, more favorable than the one to which he and his co-defendants were entitled. *United States* v. *Tramunti*, *supra*.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
JOHN S. SIFFERT,
MARTIN B. MCNAMARA,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS E. ENGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of October, 1976, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

JOHN A. CIAMPA, ESQ.
785 West End Avenue
New York, New York 10025

ELEANOR JACKSON PIEL
36 West 44th Street
New York, New York 10036

NANCY ROSNER
401 Broadway
New York, New York 10013

HARRY R. POLLAK, ESQ.
299 Broadway
New York, New York 10007

LAWRENCE H. LEVNER, ESQ.
521 Fifth Avenue
New York, New York 10017

HAROLD SCHWARTZ, ESQ.
16 Court Street, Suite 911
Brooklyn, New York 11241

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas E. Engel
THOMAS E. ENGEL

Sworn to before me this

15th day of October, 1976.

Iola Walker (Kozin)

IOLA WALKER
Notary Public, State of New York
No. 52-4131670
Qualified in Suffolk County
Certificate filed in New York County
Term Expires March 30, 19~~7~~7